



**British Institute of
International and
Comparative Law**

COLLECTIVE REDRESS POLAND



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**British Institute of
International and
Comparative Law**

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I. General Collective Redress Mechanism

1. Scope/ Type

a. Horizontal/ sectoral

The Polish Class Actions Act was initially contemplated as an entirely generic procedural mechanism. It is still relatively wide in scope, especially following the 2017 amendment. Thus it should be considered a horizontal mechanism and discussed under the general section of the report.

Due to last-minute amendments in the upper chamber of the Polish Parliament – the *Senat* – Article 1.2 specifies currently that the Act covers only “consumer claims, product liability claims and tort liability claims, excluding claims for the protection of personal interests”.

The debate concerning this amendment was very heated, and when the matter was voted again in the lower chamber (*Sejm*, the approval of which is required for all *Senat*'s amendments), 199 MPs voted against it and only 12 more – 211 - were in favour. The *Senat* also considered including labour law disputes, but this fell through because of concerns for the relatively fragile state of Polish industry.¹

To summarize, class actions can currently be brought in the following types of cases:

- Consumer law cases, including for instance: unfair contractual clauses, unfair commercial practices, consumer credit, package holiday, consumer sales (all cases involving consumer rights: M. Sieradzka, *Dochodzenie Roszczeń w Postępowaniu Grupowym. Komentarz* ²
- Product liability cases based on the implemented Product Liability Directive (articles 449.1 – 449.11 of the Civil Code of 1964, as amended), as well as on traditional fault-based tort liability provisions of the Civil Code (especially article 415),
- Other tort liability cases: including medical negligence, liability of state bodies for actions or omissions while exercising public authority (also for issuing legislative or administrative decisions), liability for actions or omissions of another person, or for damage caused by an animal, and, as far as they concern tortious acts: liability within the areas of environmental protection law, competition law, IP law, labour law.

They cannot currently be brought in the following types of cases:

- Contract claims between businesses,
- Unjustified enrichment claims between business,
- Claims in the areas of environmental protection, competition, IP and labour law that do not involve tort liability,
- Claims concerning protection of personal interests, whether in consumer cases, product liability or tort liability cases. These include personal injury claims (see below for further analysis).

The 2017 amendment of the Act widens its scope. Contractual claims, and unjustified enrichment claims between businesses are going to be covered. No other changes in scope were introduced apart from the narrowing down of the ‘personal interests’ exclusion, explained below.

Exclusion of claims for the protection of personal interests earned the Act some of the most severe criticisms. This limitation was motivated by the fact that such claims are by their very nature individualized and should therefore, according to the legislator, be sought through individual actions in court.³

¹ (Explanatory Note to the Class Actions Act, published in *Druk Sejmowy* (parliamentary note) No. 1829 of 26 March 2009. Also available on the following website: <http://www.festivalparkopole.pun.pl/viewtopic.php?pid=6> (accessed on 5 May 2017)).

² (Bringing claims as class actions. Commentary), 2nd Edition, Wolters Kluwer, Warszawa, 2015, p. 118),

³ (T.Jaworski, P.Radzimierski, “Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz”, Warszawa, 2010, Wydawnictwo C.H.Beck, p.66).

Personal interests are listed in the Civil Code: they include health, freedom, dignity and good name, conscience, name, image, correspondence, home, and creative output).⁴ Scholars agree that the list is non-exhaustive. Claims for the protection of personal interests can have a pecuniary nature, such as costs of treatment or lost earnings in cases of personal injury, or a non-pecuniary nature such as pain and suffering. The exclusion of claims for the protection of personal interests from the scope of the Class Actions Act meant in practice that no personal injury claims could be brought using the procedure (for further implications of this position see below, in the 'Impact' section). This issue was examined in the case concerning claims by family members of victims of the collapse of the Katowice Trade Hall in January 2006.⁵ While confirming that personal injury claims are indeed claims for the protection of personal interests excluded from the scope of the Act, the Supreme Court rejected the arguments of both first instance courts and ruled that claims of persons whose family members died as a result of an accident were not claims for the protection of their personal interests, but rather claims concerning monetary interests. This was so as long as these claims concerned the decreased standard of living as a result of losing a family member. Thus, according to the Supreme Court, they could be brought using the Class Actions Act even before the amendment.

The 2017 amendment of the Act extended its scope to claims for the protection of personal interests as long as these claims concern personal injury (the literal translation from Polish is "damage to body or injury to health" – article 1.2a of the Act). Further, claims by family members of a person who died as a result of sustaining personal injury are also to be covered. This amendment was welcomed by scholars and legal practitioners. The extension of the scope of the class action procedure was somewhat moderated by the requirement that monetary claims concerning personal injury, including those of family members, must be brought as 'liability-only suits' (article 1.2b).

b. Injunctive or compensatory or both

As mentioned above, the Act allows bringing compensation claims, injunction claims, or liability-only claims.

2. Procedural Framework

a. Competent Court

The courts with jurisdiction to consider class actions in the first instance are district courts rather than the (lower) regional courts. A panel of three professional judges is required. The decision to give district courts the power to consider class actions was motivated by the complexity of these cases and their novelty in the Polish system, as well as the importance of the interests at stake: the interests of class members, and the interests of justice.⁶

Ordinarily, cases in district courts are considered by one professional judge. Class actions are treated as a special type of action requiring further attention and expertise. Further, by consolidating the jurisdiction within a smaller number of district courts the Act aims to enable their judges to accumulate experience of class actions and handle them with confidence.⁷

b. Standing

Class actions can be brought in the name of at least ten people. Class members must have claims of the same kind. For instance: monetary claims, although there may be two or more types of claims included in the case, for instance a monetary claim and a request to stop certain conduct, as long as these are of the same kind among all class members – this point was confirmed in the certification decision of 26 April 2016 of District Court of

⁴ Article 23 of the Civil Code. On their protection in Polish tort law see E. Baginska, M. Tulibacka, "Poland", in *International Encyclopaedia of Laws: Tort Law*, Edited by Ingrid Boone, Alphen aan den Rijn, NL: Kluwer Law International, 2014, pp. 194-198

⁵ Supreme Court decision of 28 January 2015, I CSK 533/14; judgements in the earlier attempts at bringing a class action in this case were examined in: M. Tulibacka, "An Update on Polish Class Actions" on <http://globalclassactions.stanford.edu/content/update-polish-class-actions>

⁶ M. Sieradzka, *Dochodzenie Roszczeń w Postępowaniu Grupowym. Komentarz* (Bringing claims as class actions. Commentary), 2nd Edition, Wolters Kluwer, Warszawa, 2015, p. 184; and Explanatory Note to the Class Actions Act, published in *Druk Sejmowy* (parliamentary note) No. 1829 of 26 March 2009. Also available on the following website: <http://www.festivalparkopole.pun.pl/viewtopic.php?pid=6> (accessed on 5 May 2017).

⁷ M. Sieradzka, *ibid*, p. 184

Warsaw, XXV C 915/14. The claims must have the same or similar factual basis, such as the presence of the same or similar unfair clause in consumer contracts, the same tortious conduct, use of a certain product manufactured or imported by the defendant, or the same unfair commercial practice by a trader - article 1.1. This provision was not changed in the 2017 amendment.

The class representative in Poland is the 'named party' who brings the case in his own name but on behalf of all class members. The Act limits the persons who can represent the class to two categories:

1. class members and
2. regional consumer ombudsmen.

The latter can only bring a class action within the scope of their prerogatives (article 4.2). Regional consumer ombudsmen are public functionaries operating alongside the local (*powiat*) authorities. They were established by the Act of 5 June 1998 *on powiat self-governance authorities (o samorządzie powiatowym)*.⁸ Their powers were regulated by the Act of 16th February 2007 on the protection of competition and consumers (later amended, published in Dziennik Ustaw of 2017, item 229). These powers include mediating disputes between consumers and traders, consumer advice, and bringing litigation or joining litigation in consumer matters.

A number of problems arise with regard to the regional consumer ombudsmen's potential role in class actions. Albeit dealing with consumer matters in their work, consumer ombudsmen may not have the territorial and financial 'reach' necessary to organize and coordinate a class action. Prosecutors and non-governmental organizations, such as consumer associations, could potentially ensure such greater 'reach', but they cannot bring class actions currently. A further problem relates to the exact scope of the ombudsmen's power to represent a class. As mentioned above, the Act requires that ombudsmen act as class representatives within the scope of their prerogatives. The prerogatives of consumer ombudsmen, as specified by legislation, cover protection of consumer rights. It is therefore clear that they cannot represent persons who are not consumers. This could be a problem in cases where some class members are consumers and others – small businesses. Consumer ombudsmen are wary of this limitation and would be reluctant to get involved in litigation which might involve businesses as well as consumers.⁹ The problem is of course that at the time of bringing the lawsuit it is not always possible to ascertain that all class members are consumers. In the light of these issues, some consumer ombudsmen are very sceptical about the true value of their new power. Marek Radwański even referred to it as a 'façade' and 'propaganda' rather than a true possibility.¹⁰

All class representatives, including consumer ombudsmen, must be represented by a barrister or solicitor, unless they themselves are a barrister or solicitor (article 4.4). This requirement for consumer ombudsmen was confirmed by the Supreme Court in the judgement of 13 July 2011.¹¹

c. Availability of Cross Border collective redress

The class action procedure is not limited in scope to domestic cases only. It is also not limited to Polish citizens. In cases where foreign claims or foreign parties are involved, the rules of private international law will apply.

d. Opt In/ Opt Out

Principal availability of either/or/both options?

The Polish Class Action procedure is an opt-in procedure. No opt-out option has been considered so far, and it is unlikely that it will be proposed any time soon.

Below is a short analysis of the provisions concerning opting-in to a class action, including publicity:

⁸ Published in Dziennik Ustaw of 2001 r., No. 142, item 1592

⁹ Marek Radwański "Powiatowy (miejski) rzecznik konsumentów w postępowaniu cywilnym" (regional (town) consumer ombudsman in civil proceedings), 2012 Biuletyn Rzeczników Konsumentów, No. 1, pp. 4 – 8, http://www.rzecznicy.konsumentow.eu/biuletyny/Biuletyn_rzecznikow_nr_1_2012.pdf. Marek Radwański is the regional consumer ombudsman for Poznań

¹⁰ *ibid*

¹¹ III CZP 28/11.

After the class certification decision is final (see below for the structure of the proceedings), the court issues a statement on the commencement of the class action.

This statement contains:

- Information about the court where the class action is going to be taking place,
- Information about the parties and the subject of the action,
- Information that potential class members can join the class within a period specified by the court (between one and three months from the publication of the statement) by submitting a written document to this effect to the class representative,
- Information on the lawyers' fees and the payment arrangements,
- Information on *res judicata* for all those who join.

Potential class members are thus given a specified time period for joining the action, and they cannot join after the time period expires (article 11.5). This issue is explored below, in the section concerning potential lack of conformity of the Polish class action procedure with the Recommendation (Recommendation no. 22 and 23). Class members cannot join and leave the class at simply any stage of the proceedings. The time frame for joining and leaving is regulated quite strictly.

e. Main procedural rules

Admissibility and certification criteria

As mentioned above, class actions can be brought in the name of at least ten people with claims of the same kind and with the same or similar factual basis (article 1.1). The Act does not have many other detailed certification criteria, although it does contain a very interesting commonality requirement that seems quite unique. The Act requires that class members who have monetary claims make them equal with the other class members (albeit this can be done in sub-classes of at least two people) (article 2.1). This standardisation requirement was made more precise in the 2017 amendment, but no significant changes were made.

Thus, those who decided to opt in and join the class may sometimes need to modify their claims to make them equal with the others. They are covered by *res judicata* and cannot claim additional amounts in separate actions. This requirement was criticized as unconstitutional (taking away the constitutional right to access justice – to the extent that one needs to forego a part of one's claim).¹² Even if one were to acknowledge that this criticism may result from a misunderstanding of the nature and purpose of class actions, it must be recognized that the requirement causes many substantive and procedural problems for class members. Lawyers representing them argue that it means reducing claim amounts to the level of the person whose damages are lowest in the class (or sub-class) because according to ordinary civil procedure rules, Polish courts will not award compensation above the actual damage. In fact, this is the provision most commonly mentioned by those who are disappointed by the new Act.

The response to this limitation may well be exactly what the drafters of the Act intended. If a case involves class members with different levels of damage caused by the same or similar event, the requirement is often circumvented. Lawyers representing class members report that they advise them to limit the claim to declaratory relief only. This option is expressly allowed by the Act (Article 2.3). Indeed, a large law firm based in Kraków (Kos, Kubas & Gaertner (KKG)) representing class members in a number of suits reported that this was done in at least three cases. In an interview (July 2012), one of the partners of KKG – Professor Kubas referred to the possibility of bringing a declaratory relief suit as a measure that 'saves' the Act's utility in many ordinary cases. His view was that in most cases involving monetary claims, instead of attempting to convince their clients to limit their claims to some extent, his law firm would opt for declaratory relief and plan to follow it with

¹² A. Kubas, R. Kos, „Opinia w sprawie projektu ustawy o dochodzeniu roszczeń w postępowaniu grupowym” (druk sejmowy nr 1829), Kraków, 20.10.2009, p. 4. The lawyers representing victims of floods intending to bring class actions against the state authorities also expressed this view: in M. Domagalski “Pryśka mit pozwów zbiorowych” (the myth of class action dispelled), Rzeczpospolita, 28.06.2010, <http://www.rp.pl/artukul/503821,527163-Pozwy-zbiorowe-w-praktyce-trudniejsze.html>

individual claims. The 2017 amendment clarified that in declaratory relief suits, while the claim document must provide information that monetary claims are the ultimate aim, there is no need to provide the exact amounts (the new article 6.1a).

Single or Multi-stage process

There are four distinct stages in the class action procedure. Below is the analysis of the stages as regulated currently, before the 2017 amendment.

The first stage starts with a lawsuit brought by a class representative (with the mandatory legal representation). The court notifies the defendant of the lawsuit, and considers whether all the requirements (mentioned above) have been met and thus whether the class action can be certified (this complies with Recommendation no. 8). It is also during this stage, and more precisely at the time of the first procedural activity (which in most cases would be the response to the suit), that the defendant can ask for security for costs (see below, in the 'Costs' section). Lawyers dealing with class actions in Poland reported that this first stage is the longest, most costly and complex.¹³ The decision to certify a class action, which can be appealed, concludes the first stage. The decision contains information about the action, the class representative, arrangements concerning remuneration of lawyers, and the names of class members who joined so far.

After the decision becomes final (either it has not been appealed or the appeal did not succeed), the court coordinates activities aimed at notifying all potential class members of the class action: by placing information in national or in regional press. It can also decide that no further notification is required if all potential claimants joined the class already. The second stage focuses on these activities within the time period set out by the court for joining the class. After the time limit passes, the court formally confirms who the class consists of. The decision can be appealed by the defendant, questioning class membership of specific persons. Currently, no proceedings on the substance of the case can commence until this appeal has been addressed by a final decision.

After the decision completing the previous stages becomes final, the third stage: the proceedings concerning the substance of the case, begins. The proceedings are concluded by a judgement on substance as well as a decision on costs.

The fourth and final stage, after the judgement becomes final, is enforcement. The judgement, naming all class members and specifying their claims and the amount of damages due to them (if any), is the execution title.

The current structure of the proceedings, including a number of possibilities for the parties to delay proceedings, was criticised very heavily. The first two stages take what many commentators consider as a disproportionate amount of time.

The class action against M Bank (previously: BRE-Bank) illustrates the problems with the non-flexible, formalistic structure of class action proceedings (this case is analysed further below, in the Case Reports section; it is still ongoing).

Here is the timeline:

20 December 2010 – class action lawsuit brought before district court

6 May 2011 – district court certifies class

28 September 2011 – appeal court denies the defendant's appeal against certification – certification final

28 December 2011 – the district court issues a decision on the text of the public announcement and its placement in *Gazeta Wyborcza* (a daily newspaper)

31 January 2012 – publication of the announcement in *Gazeta Wyborcza*

6 September 2012 – decision of the district court confirming the final membership of the class

29 November 2012 – the court of appeal denies the defendant's request for security for costs (formalities officially completed – start of the substantive part of the proceedings)

¹³ I. Gabrysiak, "Postępowanie sadowe w polskim prawie", 2014

16 June 2013 – the first substantive hearing

3 July 2013 – first instance decision in favour of claimants

30 April 2014 – the court of appeal confirms the first instance decision.

Thus, it took 30 months from when the case was brought for the first hearing on the substance to take place. The whole procedure from bringing the case to the court of appeal decision took 40 months. When compared with the average district court case length of 7.8 months this is striking, even considering that class actions are normally more complex than litigation in individual cases.

In fact, this case is still being considered, as the Supreme Court, in cassation proceedings brought by BRE Bank, cancelled the judgement of the Court of Appeal and referred the case back to this court. The reason for cancellation was not related to aspects of the class action procedure but to the interpretation of substantive contract law.¹⁴ See below.

The problem with the procedure currently is the formalistic regulation of the proceedings, and insufficient flexibility and discretion for judges conducting litigation in class actions. This issue, including the 2017 amendment aimed at reducing these problems, is examined directly below.

Case-management and deadlines

As described above, class actions progress through district courts in four distinct stages regulated in a very formalistic manner. Judicial case management and discretion do not feature strongly in the current Act. The 2017 amendment is aimed at making the structure more flexible, allowing the court to control the progress of the case and prevent the parties or the current undue formalism from obstructing the smooth progress of the proceedings. Several amendments were introduced:

First, the court will no longer need to hold a separate hearing devoted to a certification decision. This decision will now be taken at a non-public session, at which the court will either decide to certify, or refuse to certify and thus reject the class action (article 10.1 and 10.1a). Before this session is held, the court will request that the defendant submit an official response to the claim.

Further, once the certification decision is final, the certification issue can no longer be considered again during the proceedings (this is unclear under the current Act) (the new article 10a). The certification decision as well as the decision to refuse certification can be appealed, and subsequently the cassation proceedings can be brought before the Supreme Court. In the amendment, the Supreme Court has been given the power to cancel the decision refusing to certify the class action, and by doing so also to certify the class (the new article 10b).

Currently, the court's decision finalizing the second stage of the proceedings (the decision finalizing the class) can be appealed, and the third, substantive stage cannot start before the appeal proceedings are completed with a final decision. The 2017 amendment makes it clear that the appeal on this issue does not suspend the proceedings. The new article 17.2a provides that immediately after issuing the decision the court must set the time for the hearing on the substance of the case or continue with the proceedings in some other appropriate manner.

Expediency (particularly in injunctive cases)

The Act does not prescribe any specific steps ensuring expediency, but see the above remarks concerning the 2017 amendment toward increasing the smooth progression of the proceedings.

Evidence/discovery rules

Rules concerning evidence and discovery are not included in the Class Actions Act. The ordinary evidential rules of the Code of Civil Procedure apply here. The Polish civil procedure does not encourage extensive discovery.

¹⁴ Supreme Court judgement of 14 May 2014, II CSK 768/14, <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20csk%20768-14-1.pdf>

Interim measures

The Act does not contain rules on interim measures. Again, the Code of Civil Procedure applies.

Court directed settlement option during procedure

The Code of Civil Procedure requires judges to inform litigants about amicable ways to settle disputes, and in particular of mediation (article 210.1). According to the Class Actions Act, the Court may refer the parties to mediation at any stage of the proceedings (article 7 of the Act). The nature of mediation, however, prevents the court from getting directly involved in any settlement negotiations. The negotiations will be voluntary, so will the settlement. The Act does not regulate any form of court-directed settlement.

Mediation is regulated in the Code of Civil Procedure, amended by the Act of 13 October 2015 on supporting amicable methods of resolving disputes. Currently, the court may refer parties to mediation at any stage of proceedings in all types of cases (article 183.8). The costs of mediation are included in the overall litigation costs that are apportioned to the losing party after the case is concluded (see below for the explanation of the operation of the ‘loser pays rule’ in Poland). Parties who unreasonably and contrary to the requirements of good faith refuse to engage in mediation may be required by the court to cover the costs of litigation that ensued as a result of this refusal (article 103.2). The latter provision does not alter the voluntary nature of mediation. It only applies when the party’s conduct is deemed by the court to be unjustifiably unfair and disloyal.

According to the Code of Civil Procedure, the chief judge in the case should encourage the parties to settle the dispute, especially at the first hearing (Article 223). The settlement, if concluded, is attached to the official report of the hearing. The court will approve the settlement unless it is apparent from the circumstances that it is contrary to law or to the principles of social cooperation (the principles of social cooperation are a general clause quite prominent in Polish civil law, similar to the principle of good faith) (article 103.4).

In case of out of court settlements: judicial control

See above.

3. Available Remedies

a. Type of damages

The types of damages available in class action proceedings are the same types of damages as are available generally in civil proceedings. They depend on the area of law involved and the types of damages allowed, especially under the Civil Code if it is a breach of contract, a tort or unjustified enrichment.

The general principle in Polish civil law is one of full compensation. Unless legal provisions or a contract between the parties specify otherwise, compensation ought to include redress of damage sustained and of the profits the victim would have achieved had the damage not occurred.¹⁵ The Civil Code provides the general rules concerning redress of damage:

“Damage shall be redressed, at the election of the injured person, either by restoration of the previous state of affairs or by the payment of an appropriate sum of money. If, however, restoration of the previous state of affairs is impossible or if it would entail undue hardship or excessive costs to the person liable, the injured person’s claim shall be limited to a pecuniary payment” (art. 363.1 of the Civil Code).

Polish civil law provides for redress of pecuniary and non-pecuniary damage. While pecuniary damage is redressed according to the principles established in article 363.1 quoted above, non-pecuniary damage can only be compensated in cases when law permits such redress. Non-pecuniary damage can be redressed in personal injury cases, including by family members of persons who died as a result of personal injury, when other personal interests have been infringed (such as privacy or dignity), when someone was deprived of personal liberty, in

¹⁵ article 361.2 of the Civil Code; for a more detailed analysis see E. Baginska, M. Tulibacka, “Poland”, in *International Encyclopaedia of Laws: Tort Law*, Edited by Ingrid Boone, Alphen aan den Rijn, NL: Kluwer Law International, 2014, pp. 147-168

cases involving infringements of patients' rights, in sexual assault or misconduct cases, in some other areas of criminal law, as well as in election law, copyright law and patent law.¹⁶

b. Allocation of damages between claimants for compensatory claims/ distribution methods

As mentioned above, in order to bring monetary claims in a class action, class members must standardise their claims with the rest of the class, or at least in a sub-class of at least 2 people. This constitutes an exception from the principle of full compensation: some class members will not receive such full compensation.

Despite allowing compensation of monetary claims in class actions, Polish law does not recognise the concept of collective damage. Each class member is awarded damages due to him or her individually in the judgement concluding the case.¹⁷

c. Availability of punitive or extra-compensatory damages and their conditions

No punitive damages are allowed in Polish civil law.

d. Skimming-off/ restitution of profits

The principle of full compensation explained above means that profits that a party gained as a result of a breach of contract, a tort, and other infringements, are not taken into account when assessing the damages due to the other party.

e. Injunctions

As mentioned above, class actions can concern a request to stop certain conduct, either together with monetary claims or by themselves.

f. Possibility to seek an injunction and compensation within one single action

See above.

g. Possibility to rely in an injunction in separate follow-on individual or collective damages actions

Polish Class Actions Act allows injunction claims (where the claims concern a request to stop certain activity or activities) or liability-only (declaratory relief) claims. As mentioned above, the amended Class Actions Act requires that, in declaratory relief cases, the monetary claims that class members shall be seeking later should be listed in the claim form, albeit there is no obligation to provide precise amounts (the new article 6.1a). The judgement concluding a declaratory relief class action may be used in further individual litigation or ADR proceedings seeking individual redress. After the amendment, the judgement will need to contain a list of issues that are common to the class and that are the basis for subsequent individual monetary claims by class members (the new article 2.4 of the Act).

h. Limitation periods

The Class Actions Act does not prescribe any specific limitation periods for actions. The normal limitation periods as regulated by substantive law (especially the Civil Code) apply.

4. Costs

a. Basic rules governing costs and scope of the rules

The Class Actions Act sets the court fee for lodging the case at 2% of the value of the claim (not lower than 30 PLN and not higher than 100.000 PLN), which is lower than in most other types of litigation and yet may be a high amount considering the potentially high numbers of people involved. In cases where a regional consumer ombudsman is a class representative, the court fee is waived.

¹⁶ E. Baginska, M. Tulibacka, "Poland", in *International Encyclopaedia of Laws: Tort Law*, Edited by Ingrid Boone, Alphen aan den Rijn, NL: Kluwer Law International, 2014, pp. 149-154

¹⁷ E. Baginska, M. Tulibacka, "Poland", in *International Encyclopaedia of Laws: Tort Law*, Edited by Ingrid Boone, Alphen aan den Rijn, NL: Kluwer Law International, 2014, p. 147

Other costs of class actions are the costs of legal representation (lawyers' fees). In Poland the fees for barristers (adwokaci) and solicitors (radcy prawni) are determined by contract with the clients. Polish lawyers normally charge an hourly fee, or a per-task sum of money, agreed in advance with clients. Sometimes these fees are supplemented by an additional amount if the case takes more time than planned or is very complex. Further, they can also be complemented by a small percentage of the money recovered (success fee) (on the specifics of fee arrangements in class actions see below).

b. Loser Pays Principle (and exceptions from it)

The 'loser pays' rule, albeit modified to include a tariff for lawyers' fees and some judicial discretion for awarding a percentage or even no costs to winner if the loser's circumstances call for it or if the winner behaved unreasonably during proceedings, applies to class actions. The 'loser pays' principle is regulated by Articles 98 and 108 of the Code of Civil Procedure of 1964.¹⁸ Article 98 of the Code specifies that only necessary, reasonably incurred costs will be awarded to the winning party. The court determines which costs were indeed necessary and reasonably incurred. There are a number of exceptions from the full application of the loser pays rule, as established by the Code of Civil Procedure:

If a party only partly won the case, costs may be apportioned equally or proportionately between the parties (article 100),

If the defendant accepted the claim immediately and did not prolong litigation, the court may request the claimant to cover the defendant's costs (article 101),

If specific circumstances justify it, the court may decide that the loser covers only part all none of the winner's costs (article 102),

The party who behaved unreasonably during litigation, for instance by unreasonably and against the requirements of good faith refusing to take part in mediation, the court may make an adverse costs order (article 103),

Settlement between the parties can apportion the costs equally or in some other manner (articles 104 and 105).

In practice, the tariff system for lawyers' fees and for experts' fees means that the winning party, even if awarded all the costs, may be left with irrecoverable costs.

In the context of success fees, even if the class won the case the lawyer will only be able to recover from the loser what the tariff system indicates. While it is likely that the court will award more than the minimum tariff (up to six times the minimum may be awarded), the amount may well remain much lower than the actual fee that was agreed. The remaining money will need to be covered by the class members.

5. Lawyers' Fees

Availability (or not?) of contingency fees and their conditions

As mentioned above, legal representation is a requirement – both for a class representative who is a class member and for a regional consumer ombudsman. In contrast to the rules of lawyers' ethics applicable to all types of litigation¹⁹ which prohibit lawyers from charging success fees unless they are an addition to regular hourly or per-task fees, the Class Actions Act allows lawyers to agree to a success fee as the only form of remuneration. The Act allows lawyers representing the class to conclude no-win-no-fee arrangements, with the upper limit of their total remuneration being 20% of the value of the case (article 5).

It appears that in practice these types of agreements are extremely rare. There is anecdotal evidence of one such agreement having been concluded in a class action led by a sole practitioner. Another contingency fee arrangement was concluded in the Sandomierz flood case (handled by the law firm KKG, still on-going), but it

¹⁸ On the features and implications of the 'loser pays' principle in Poland see M. Tulibacka "Poland" in C. Hodges, S. Vogenauer and M. Tulibacka (eds.) "The Costs and Funding of Civil Litigation. A Comparative Perspective", Oxford: CH Beck; Hart, pp. 453 – 466, at p. 466

¹⁹ Paragraph 50.3 of the Barristers' Code of Ethics (Kodeks Etyki Adwokackiej), and Paragraph 29.3 of the Solicitors' Code of Ethics (Kodeks Etyki Radcy Prawnego)

was subsequently repealed and a new up-front fee was agreed. This change was triggered by the amendment of the claim: from a monetary claim of a number of sub-classes to declaratory relief only.

Lawyers in class actions prefer to use traditional cash remuneration. Many see class actions as too risky to invest in as the procedure has not yet been tested fully and the cost exposure for lawyers, especially in complex cases, is unknown. Thus, in a recent case against the investment company Amber Gold, the law firm of Chałas i Wspólnicy demanded an up-front fee the amount of which depends upon the amount claimed by each class member. It is estimated that the total loss to all investors exceeds 200 million PLN.²⁰ The law firm demanded between 3,3% and 9,8% of the value of each person's claim as remuneration payable up-front, in addition to collecting 2% of the value of each claim to cover court fees. Gazeta Wyborcza quoted information given by the law firm that if an amount up to 10,000 PLN is sought, the firm charges 984 PLN, and if it is an amount over 90,000 PLN, the lawyers' remuneration is 3,000 PLN.²¹ For other amounts, some amount in between is charged. The class was divided into more than 100 sub-classes, claiming between a few thousand and a few hundred thousand PLN.

6. Funding

a. Availability of funding

The Class Actions Act does not allow class representatives to obtain legal aid (which in Poland consists of legal assistance nominated by court and a waiver of court fees). The only types of available funding are: contingency fee agreements (success fees) with lawyers (see above), and private funding. In fact, most cases are self-funded privately by each class member.

b. Origins of funding (public, private, third party)

See above.

c. Conditions and frequency of resort to third party funding

Third-party funding is not yet popular in Poland. I have no information about any such funding provided for class actions so far.

7. Enforcement of collective actions/settlements

a. Framework for enforcement

Judgements concluding class action proceedings must contain a list of all class members and, if they concerned monetary claims, the amount of compensation due to each class member (article 21). An excerpt from the judgement is an 'execution title' (*tytuł egzekucyjny*) for each class member (article 22). An execution title needs to be duly authorised by a court in order to become an execution title that can be used by the execution authorities (*tytuł wykonawczy*, the authorities include the bailiff).

If the case concerned non-monetary claims, execution commences upon the class representative's request. If the request has not been made within 6 months from when the judgement became final, any class member can make the request (article 23).

b. Efficient enforcement of compensatory/ injunctive order

See above.

c. Cross border enforcement

No specific rules on cross-border enforcement are contained in the Class Actions Act.

²⁰ Gazeta Wyborcza, 31 August 2012, "Do gdańskiego sądu wpłynął pozew zbiorowy przeciwko Amber Gold", http://wyborcza.biz/finanse/1,105684,12400194,Do_gdanskiego_sadu_wplynal_pozew_zbiorowy_przeciwko.html

²¹ Gazeta Wyborcza, 24 August 2012, "Ile zarobią adwokaci na klientach Amber Gold", http://biznes.gazetaprawna.pl/artykuly/642188,ile_zarobia_adwokaci_na_klientach_amber_gold.html

8. Number and types of cases brought/pending

As of the end of 2016, 188 class actions were brought (amounting to the average of around 31 cases per year) in civil cases, and 7 in commercial cases. While this may seem like a significant number, one needs to put it in perspective: in 2015 the number of claims brought before civil courts in Poland was around 6.5 million. The most common defendants in class actions are: banks, other financial and insurance institutions, the state (specifically: local authorities), some internet-based service providers, and residential builders.

Of the 188 civil and 7 commercial claims, around 117 and 5 respectively were completed. 33 civil claims and all 5 commercial suits were rejected (refused certification because they did not meet the conditions set out by the Act), and 45 civil suits were returned because of various formal inadequacies. Only 38% of the civil claims actually went through the phase of substantive adjudication. A large number of those claims are still in the system. Only a handful have been concluded with final judicial decisions. Because there is no official register of class actions yet, it is difficult to find information about these decisions.

9. Impact of the Recommendation/Problems and Critiques

In general, it is thought that the Act and the procedure it introduced were something of an experiment, and the experiment is not working as well as it was hoped. Indeed, some commentators even talked of the death of class actions in Poland and called for their resuscitation. The most significant problems were identified as:

- The limited scope of the Act and other strict certification criteria (exclusion of personal interests, standardisation requirements for monetary claims), some of which create barriers to bringing claims in cases where class actions would in fact be extremely useful
- Lack of flexible funding mechanisms (the conditional fee arrangements permitted by the Act are not used in practice)
- The formalistic and complex structure of the proceedings, with the first formal stage (certification) and the stage of class formation often lasting between 2 to 3 years

These problems, and the changes forthcoming after the 2017 amendments, were examined throughout this Report. While the 2017 amendment dealt with some of the weaknesses of the system, it is to be seen how the class action procedures will progress under the new rules. Some further problems, including the inconsistencies with the Recommendation, are mentioned below.

a. Consequences where no collective redress mechanism is available

While the Polish Class Actions Act is relatively wide in scope, it does exclude some important areas of law and some types of claims, some of which seem to be well suited for a collective procedure. In the context of the Recommendation these exclusions are problematic.

Indeed, some of the most significant criticism of the Class Actions Act concerns its limited scope. Lawyers acting for class members as well as scholars expressed the view that the scope of application of the Act was overly and unnecessarily limited, and there was a strong feeling that, in particular, labour law disputes ought to have been included.²² On the other hand, employees are not always prevented from bringing class actions against their employers. If an action is not based on labour law provisions but on general tort law, a class action is possible.²³ The same reasoning applies to competition law claims or environmental law claims. It must be said here, however, that no class actions in these areas of law have been brought so far. The same reasoning applies to competition law claims or environmental law claims. It must be said here, however, that no class actions in these areas of law were brought so far.

The issue of exclusion of personal interests from the scope of the Act was already examined above, together with the 2017 amendment narrowing down this exclusion somewhat. In the context of the Class Actions Act, personal interests are key with regard to tort liability claims and product liability claims, perhaps less so in consumer law claims, which are more likely to be straightforward monetary claims. Personal injuries,

²² Professor A. Kubas of Kubas, Kos & Gaertner, in an interview, July 2012

²³ W. Ostaszewski, Rzeczpospolita, December 5, 2012 "Poszkodowani w wypadku przy pracy mogą wystąpić z pozwem zbiorowym" (those injured in the workplace can bring a class action) <http://prawo.rp.pl/arttykul/792854,958037-Poszkodowani-w-wypadku-przy-pracy-moga-wystapic-z-pozwem-zbiorowym.html>

infringements of personal freedom, dignity or name are the most common forms of losses in tort or product liability claims. Their exclusion from the scope of the Class Actions Act was therefore difficult to justify. This was particularly problematic with regard to personal injury: if all personal injury claims are excluded, what indeed is left in most ordinary product liability cases? While personal injury claims are going to be included when the 2017 amendment comes into force, other personal interests such as dignity or good name still cannot be sought in class actions.

It was quite clear that the Act was to some extent meant to be a test, and further areas would be included in future. The concern for the economy seems to have been an important factor, but once the debates around the class actions settled and there was a greater clarity on the potential impact of the Act, changes were almost certain. It is possible that further areas of law will be added in future.

b. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)

I am not aware of any scholarly or policy papers concerning the impact of collective redress on the conduct of stakeholders.

c. Incompatibilities with the Recommendation's principles

The reasons for and the problems with limited scope were examined above.

Another incompatibility relates to the issue of class members/potential class members joining and leaving the class. The Recommendation suggests that, unless this undermines sound administration of justice, potential and actual class members ought to be able to join the class and leave the class any time before the judgement is given or the case is settled (Recommendations no. 22 and 23). The Polish Class Actions Act, on the other hand, introduces very strict time limits, controlled by courts, on the ability to join and leave a class. As mentioned above, potential class members cannot join after the time limit for them to do so, set by the court in the information on commencement of the action, has expired (article 11.5). An exception was introduced in article 17.2, where a person who, before the class action is commenced, took action that could be part of the class action against the defendant, can join the class at any time before the judgement in the first instance is given. Further, leaving the class after the decision ultimately establishing the class has become final is impossible (article 17.3 after the amendment). According to some commentators, including the Helsinki Foundation's Report on class actions, this is not a point of concern. According to the Report, the Class Actions Act allows to precisely define the membership of the class in the interests of both parties, and eliminates the possibility of the defendant 'tempting' some class members out of the class with individual settlement offers.²⁴

Further, one should agree with the same Report of the Helsinki Foundation, that the possibility of lawyers being paid on a contingency fee basis in the Polish class action procedure, albeit going against the Recommendation, is also not a concern because of a whole set of checks and balances instilled in the procedure, including its opt-in nature (ibid.).

d. Problems relating to access of justice/fairness of proceedings including

- Restrictions on access to justice negatively affecting collective redress
- Time and burden of collective actions on courts and parties compared to non-collective litigation
- Risks of and examples for abusive litigation
- Effective right to obtain compensation

With regard to access to justice and the effective right to obtain compensation, the formality and length of the proceedings in the first two stages, before the merits are considered, have been a significant problem in Poland. The review of the problems and of the changes introduced by the 2017 amendment was provided above. It is hoped that the changes will lead to greater efficiency.

²⁴ M. Niedużak, M. Szwał, *Pozwy grupowe - doświadczenia po czterech latach*, Helsińska Fundacja Praw Człowieka, Warszawa, lipiec 2014, p. 9

Another problem affecting access to justice and effective compensation in Poland is the specific standardisation requirement for monetary claims, also explored above. This was not changed in the 2017 amendment.

Further criticisms that remained unanswered in the 2017 amendment relate to the limited scope of potential class representatives. No doubt this relatively limited scope of class representatives was aimed at strengthening the system of checks and balances for the procedure. Some argue, however, that prosecutors and non-governmental organizations should also be able to bring class actions. According to the Code of Civil Procedure, they can bring litigation in individual cases (prosecutors in any case, non-governmental organizations – in cases specified by legislation – article 68 of the Code of Civil Procedure). Being able to bring class actions would be a natural extension of these powers. It is difficult to discern, looking at the preparatory work to the Act, why consumer ombudsmen were selected as the only allowed class representatives other than class members. Empowering a public official to bring class actions makes sense if that official provides an effective filtering process, and on the other hand assists those who might otherwise not be able to bring a class action. Expertise and experience are fundamental to meet both these goals. If it is expertise that the drafters of the Act meant to ensure, it is not exactly certain why consumer ombudsmen would be deemed to guarantee it to a greater extent than consumer associations or prosecutors.

II. Sectoral Collective Redress Mechanism(s)

As mentioned above, actions for injunctions in consumer cases can be brought before the Head of the Office for the Protection of Competition and Consumers (they are regulated in the Act on the Protection of Competition and Consumers of 16 February 2007, as amended, published on 26 January 2017 (in Dziennik Ustaw of 2017, item 229; the original text was published in Dziennik Ustaw of 2007, nr 50, item 331). The Head of UOKiK has direct injunction powers in actions brought by anyone, including consumers, for the protection of collective consumer interests (these powers constitute implementation of the Consumer Injunctions Directive 98/27/EC, as codified by Directive 2009/22/EC, article 100 of the Act on the Protection of Competition and Consumers).

He or she also has injunctive powers in cases concerning unfair contractual clauses (article 99a of the same Act). The latter can be collective or individual cases.

Both procedures are administrative in nature, with the possibility of an appeal to the Court for the Protection of Competition and Consumers in Warsaw.

The consumer injunctions procedure can be commenced by anyone, including a foreign organization that is a qualified entity featured in the register of qualified entities as established by the Consumer Injunctions Directive (article 100 of the Act).

The unfair contractual clauses procedure can be commenced by a consumer, a consumer ombudsman, the Ombudsman for the Insured, and a consumer organization, including a foreign consumer organization that features on the list of organizations with the standing to bring such an action (the list is published in the Official Journal of the EU) (article 99a).

The consumer injunctions procedure includes a possibility of an interim decision by the Head of UOKiK, if it is probable that the conduct, if continued, may cause serious and irrevocable damage to the collective interests of consumers. This interim relief decision can remain in force until the final decision in the case is taken (article 101a).

The proceedings in both types of cases should not take more than 4 months, and in very complex cases – 5 months. If important consumer interests are at stake, the Head of UOKiK may give the final decisions the executive force.

III. Information on Collective Redress

1. National Registry

No national registry yet. It was announced in the 2017 amendment (the new article 11a of the Class Actions Act). The registry will be kept and updated by the Ministry of Justice.

2. Channels for dissemination of information on collective claims

The statement on the commencement of the class action should be published in the popular national press, although there is also a possibility of publishing it only in regional press, depending on the circumstances. Further, the court may decide to not publish the statement if it is clear from the circumstances that all the potential class members already joined the class (the current article 11 of the Act). The manner in which the information requirements were regulated was criticised by judges and consumer ombudsmen, who argued that it was not cost-effective and did not include more flexible, cheaper and more accessible means of publication like the Internet.²⁵ In one case, it was reported that the cost of information (to be covered by the claimant) was 5,000PLN (about 1,200 Euro, *ibid.*). This is a high amount in Poland, and is particularly striking because publishing the same information online would be significantly cheaper.

The 2017 amendment made the requirements concerning publicity more flexible, allowing the judge to select the means of publication that are best suited to the circumstances of the specific case. The new article 11.3 allows the court to select the means of publication: including the official bulletin of the court, websites of the parties, or the national or local press.

Further, **the new article 11a requires that the Minister of Justice should publish information about all class actions in which the statement on the commencement has been issued (as well as all completed procedures)** in the official information bulletin of the Ministry. Courts are required to send information on proceedings where the statement was issued to the Ministry, and the latter should immediately update the bulletin. **No such information has been published yet by the Ministry.**

Looking for information on class actions (those contemplated and those already proceeding, as well as those completed with judgements) is a complex process at the moment. The register of all class actions mentioned above cannot come soon enough. Private parties and law firms have set up websites where this information is collected, either for the purposes of one particular action or a number of actions (these websites are for instance: www.pozywamy-zbiorowo.pl, www.pozywamybank.pl and www.pozew-zbiorowy.com).

²⁵ Opinion of the Regional Consumer Ombudswoman for Warsaw M. Rothbert, quoted in M. Niedużak, M. Szwał, *Pozwy grupowe - doświadczenia po czterech latach*, Helsińska Fundacja Praw Człowieka, Warszawa, lipiec 2014, p. 16

IV. Case summaries

<p>1. Case name</p> <p>Cases are not given names in Poland. This was a case brought by a regional consumer ombudsman (in the name of 1247 consumers) against MBank (previously: BRE Bank)</p> <p>Reference</p> <p>II CSK 768/14, judgement of 14 May 2015</p> <p>Subject area</p> <p>Consumer law</p>	<p>Keywords</p> <p>Regional consumer ombudsman as class representative, mortgage loans amortised in Swiss Francs, unfair contractual clauses, breach of contract, standardisation of monetary claims, declaratory relief claim</p> <p>Summary of claims</p> <p>The class representative claimed that the bank used an unfair contractual term in its mortgage contracts. The mortgage was amortised in Swiss Francs. The clause allowed the bank to unilaterally adjust the mortgage interest rates depending on the “reference rate” for the particular currency, and taking account of changes in the financial parameters of the monetary and currency market in the country the currency of which is the basis for the adjustment. In the context of the mortgages amortised in Swiss Francs, the clause allowed the bank to change the rate of interest depending on LIBOR and other financial parameters of the Swiss market. While the bank was increasing the rates with the increases of LIBOR, when the latter started decreasing the rates were lowered, but this was done late and the amounts were disproportionately low. The class members claimed they were overcharged.</p> <p>Findings</p> <p>District Court (first instance):</p> <p>The requirement as to standardisation of monetary claims by class members could not be met, and thus the only type of claim that could be brought using the class action procedure was a declaratory relief claim.</p> <p>The bank used an unfair contractual clause. The clause does not bind consumers, while the rest of their mortgage contracts remains in force. The class members were overcharged on the mortgage interest rate by just over 1%.</p> <p>Court of Appeal (second instance):</p> <p>Rejected the bank’s appeal. As a result of the unfair contractual clause’s invalidity, the mortgage interest rate ought to remain fixed as from the date of the contract. As it was not fixed, the class members were overcharged.</p> <p>Supreme Court (cassation):</p> <p>Use of an unfair clause does not automatically result in contractual liability of the bank. However, it may result in such liability if it leads to the party using the clause to obtain an undue benefit at the expense of the other party.</p> <p>The courts in both lower instances erroneously assumed that once the unfair clause is eliminated from the mortgage contracts, the interest rate ought to be fixed. Other clauses in the same contract indicate that it should not be fixed. Thus, the basis upon which contractual liability was confirmed and assessed was wrong.</p> <p>The case was referred back to the Court of Appeal. The Court of Appeal’s costs decision based on the loser pays principle was annulled.</p>
<p>Dispute resolution method</p> <p>Group action</p> <p>Court or tribunal</p> <p>Supreme Court</p>	
<p>Cross-border character/ implications, if any</p> <p>None</p>	
<p>Opt-in/out</p> <p>Opt-in</p>	
<p>Type of funding</p> <p>Private funding by class members</p>	
<p>Costs</p> <p>Loser pays, not finalized yet</p>	
<p>Abusive litigation</p> <p>no</p>	

	<p>Outcomes</p> <p>Settlement: [yes][no] NO</p> <p>Remedy: [injunction][damages][both] LIABILITY ONLY</p> <p>Amount of damages awarded: [in total]+[per claimant]+[as a % of amount claimed] NONE</p> <p>Distribution of damages</p>
<p>2. Case name</p> <p>Reference</p> <p>I CSK 533/14, decision of 28 January 2015</p> <p>Subject area</p> <p>Tort liability of public authorities</p>	<p>Keywords</p> <p>Tort liability of public authorities, claims for the protection of personal interests, claims with the same or similar factual basis, declaratory relief claim</p> <p>Summary of claims</p> <p>This case was another attempt to obtain compensation from the public authorities in charge of authorisation and supervision of buildings, for deaths, injuries and damages caused by the collapse of the Katowice Trade Hall. The first attempt was a class action brought by 16 victims and their families, and was rejected by the Court of Appeal in Warsaw in September 2011 (decision of 8 April 2011, II C 121/11), as it involved personal injuries and thus dealt with protection of personal interests.</p>
<p>Dispute resolution method</p> <p>[Group action]</p> <p>Court or tribunal</p> <p>Supreme Court</p>	<p>The present case was brought by families of those who died in the tragedy. They alleged that the General Building Supervisor and a number of other public and local authorities were liable for their monetary damages related to losing a close family member. The legal basis for the claims was article 434 of the Civil Code on liability of the person in possession of a building for damage caused by its collapse.</p>
<p>Cross-border character/ implications, if any</p> <p>None</p>	<p>Because of the impossibility of standardization of the monetary claims of class members, as required by article 2.1 of the Class Actions Act, this was brought as a declaratory relief case.</p> <p>Findings</p> <p>Claims of family members concerning monetary damages caused by death, as long as they are related to lower standard of living as a result of death of a family member, are not claims for the protection of personal interests, but rather pertain to monetary interests. Earlier, both the District Court and the Court of Appeal took a different view, and they concluded that the class action could not be certified.</p>
<p>Opt-in/out</p> <p>Opt-in</p>	<p>Both lower courts were wrong in refusing to consider the case as a class action. The decision of the Court of Appeal on refusing to certify a class action was annulled. The case was referred back to the District Court.</p>
<p>Type of funding</p> <p>Private funding by class members</p>	<p>The requirement that class members' claims must be based on the same or similar factual basis does not mean that the court ought to consider each case individually in order to consider all the factual circumstances including the necessary requisites of liability (such as fault, damage and causal link) before issuing a certification decision. The same or similar factual basis required for certification concerns the general basis of the claims (such as a catastrophe that caused death and injury).</p>
<p>Costs</p> <p>Loser pays, not finalized yet</p>	<p>Outcomes</p> <p>Settlement: no</p>
<p>Abusive litigation</p> <p>no</p>	

	Remedy: liability only Amount of damages awarded: Distribution of damages:
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