

THE CLASS ACTIONS  
LAW REVIEW

SECOND EDITION

Editor  
Richard Swallow

THE LAWREVIEWS

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This article was first published in May 2018  
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Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
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Enquiries concerning editorial content should be directed  
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ISBN 978-1-912228-28-7

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# THE LAW REVIEWS

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# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALLEN & OVERY LLP

ARNTZEN DE BESCHE

BAKER MCKENZIE

CRAVATH, SWAINE & MOORE LLP

DE BRAUW BLACKSTONE WESTBROEK

HENGELER MUELLER

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URÍA MENÉNDEZ

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# PREFACE

Class actions and major group litigation can be a seismic event not only for large commercial entities but for whole industries. Their reach and impact mean they are one of the few types of claim that have become truly global in both importance and scope as reflected in this second edition.

There are also a whole host of factors currently coalescing around the litigation space that increase the likelihood and magnitude of such actions, where very significant sums are now routinely at stake. These factors include the recent political change in Europe and North America, which has begun to impact the regulatory sphere, as for the first time in decades, there is a shift towards protectionism and greater regulatory oversight. Advances in technology not only change our understanding of the world but also result in new and ever more stringent standards, offering the potential for significant liability for those who fail to adhere to such protections. Finally, ever-growing consumer markets of greater sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more sophisticated and active in promoting and pursuing such claims, and local laws are being updated so as to facilitate such actions before the courts.

Despite this, or perhaps because this is an area that, although much anticipated, has only relatively recently been recognised as a real and present threat, little attempt has been made to provide a comprehensive study of the class actions sphere. As with the first edition of this review, this updated publication aims to provide practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the world's most important jurisdictions.

**Richard Swallow**  
Slaughter and May  
London  
April 2018

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# POLAND

*Agnieszka Trzaska*<sup>1</sup>

## I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

In Poland, the mechanism of pursuing claims in group proceedings, which can be perceived as the ‘Polish version’ of the US class action, has been present since 2010. It was introduced into the Polish legal system by virtue of the Act of 17 December 2009 on Pursuing Claims in Group Proceedings, Journal of Laws 2010.7.44 of 18 January 2010 (the Act). This Act is separate from the regulation provided for by the Polish Code of Civil Procedure (CCP).<sup>2</sup> After several years, the Act was amended in 2017 by virtue of the Act of 7 April 2017 Amending Certain Acts to Facilitate the Seeking of Receivables (hereinafter ‘Amendment 1’);<sup>3</sup> the amendments have been in force since 1 June 2017.

The Polish group proceedings are a type of court proceedings facilitating the joint pursuit of many claims that are based on the opt-in model and the principle of representation.

In Article 1, the Act defines group proceedings as civil court proceedings in cases where claims of a single type from at least 10 persons are pursued, based on the same or identical actual grounds.

The Act is an example of the ‘sectoral approach’, which means that group proceedings are not permitted in every civil case (which qualifies for examination by a civil court), but in certain categories of cases (the catalogue of such cases was expanded by Amendment 1).

Thus, group proceedings are permitted in the following cases,<sup>4</sup> which involve claims:

- a* for liability for a loss caused by a hazardous product;
- b* for torts;
- c* for liability for the non-performance or improper performance of a contractual obligation;
- d* for unjust enrichment; and
- e* in other matters with regard to claims for consumer protection.

As a rule, group proceedings may not be used to pursue claims arising out of the violation of personal rights. This exclusion does not apply to options to pursue claims in group proceedings that result from bodily harm or disturbance of health, including claims of the closest family

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1 Agnieszka Trzaska is an attorney-at-law and partner at Kubas Kos Galkowski.

2 Consolidated text of 19 January 2018 published in Journal of Laws 2018.155.

3 Journal of Laws 2017.933 of 12 May 2017.

4 Prior to Amendment 1, group proceedings were permitted in cases involving claims for the protection of consumers, liability for loss caused by a hazardous product and liability in tort, with the exception of claims for the protection of personal rights.

members of the claimant, deceased as a result of a bodily harm or disturbance of health. As regards this category of claims, the pursuit of pecuniary claims in group proceedings is limited to the request for the establishment of the defendant's liability.

The entity that holds the sole mandate to institute group proceedings is known as the representative. This function can be performed by a member of the group or a *powiat* consumer ombudsman. All members of the group must approve the person who will act as the representative.

The Act is an example of solutions based on the opt-in model; participants of group proceedings can only be persons who directly expressed their will to participate in the proceedings by submitting a declaration on joining the group (before the proceedings are instituted or during the second stage, while the group is being formed, see also Section III). The very institution of group proceedings does not preclude the option for the individual pursuit of claims by persons who did not join the group or who have left the group (the admissibility of leaving the group is limited by certain time frames – see Section III.iii). A binding judgment is effective upon all members of the group, although they are not formally a party to the proceedings in which the judgment is issued.

Group cases belong to the functional competence of the regional courts. There is not a single court or several specialised courts competent for these types of cases. The cases may be examined by one of the 45 regional courts in the Republic of Poland. Group cases are examined by a panel of three professional judges.

The institution of group proceedings is quite popular in Poland. As evidenced by the statistical data published by the Ministry of Justice, a total of 195 class actions (in the Polish form) were filed in courts from 2010 to 2015. In that period, a total of 122 cases were examined in the course of group proceedings. Only approximately 38 per cent of civil cases for which group proceedings were instituted in 2010–2015 were examined on substantive grounds in that period. The majority of the class actions involve consumer claims; there are far fewer cases brought by groups of enterprises. Amendment 1 will most likely result in an increased number of such actions. Between 2000 and 2016, a majority of the group proceedings sought to establish the defendant's liability. Cases for the payment of pecuniary performance made up a small fraction of the group proceedings cases.

## II THE YEAR IN REVIEW

The Act was amended in 2017, seven years after it was passed. The purpose of Amendment 1 was primarily to increase the efficiency of group proceedings; Amendment 1 was the legislator's response to certain dysfunctions of the existing solutions that were revealed in the first years of using the group pursuit of claims mechanism.<sup>5</sup>

---

5 As the explanatory memorandum to the draft reads: 'The aim of this draft is, firstly, to overcome problems such as: (i) excessively limited objective scope of application of the Act, (ii) lengthy examination of cases in group proceedings (especially in the first stage of the so-called certification), (iii) difficulties and problems related to seeking pecuniary performance in group proceedings, (iv) interpretative doubts causing a decrease in the effectiveness of examining cases for establishing liability in group proceedings and (v) the risk of unjustified charging of the claimant with a deposit to secure the costs of proceedings. These changes are aimed at increasing the effectiveness of group proceedings. The goal of the draft is also to eliminate other specific issues and interpretative doubts that arise in the practice of application of the Act.'

The objective catalogue of cases that may be potentially examined in this procedure was expanded. What is particularly important is the extension of the option for the group pursuit of claims to include claims for the non-performance or improper performance of the agreement regardless of the object of such claims (which also includes non-consumer claims) or claims for unjust enrichment. An objective exclusion, based on the criterion for the source of the claim origin (violation of personal rights), was also limited.

The provision stipulating the requirement to standardise pecuniary claims sought in group proceedings was changed (see Section III.i and Section III.iv). The provision that stipulates a special type of action permitted in group proceedings, namely the action to establish liability, was formulated in greater detail.

Further, Amendment 1 introduced minor changes to the procedure to accelerate and improve the examination of cases in group proceedings, in particular to shorten the certification stage. The rules relating to the announcement of the commencement of proceedings were made more flexible.

To conclude explanation of Amendment 1, it is worth stressing that group proceedings instituted prior to 1 June 2017 will be subject to provisions of the Act in its existing (original) wording, while proceedings instituted after that date will be subject to provisions of the Act in their new wording.

The recent period has been dominated by group actions brought by consumer groups against financial institutions, such as banks and insurance companies, in connection with 'abusive clauses' in unfair contractual provisions.

### III PROCEDURE

Polish group proceedings are court proceedings described by specific stages; the legal regime of the proceedings is prescribed by the provisions of the Act and the provisions of the CCP.

Apart from group proceedings, which is a mechanism for the collective pursuit of claims, the provisions of the CCP provide for certain institutions related to the number of entities in court proceedings.

Under the Polish CCP, collective actions by representative bodies, for example, consumer organisations or interest groups, are not possible.

The CCP allows for actions to be brought by NGOs regarding their chartered objects in specific categories of cases (e.g., environmental protection and consumer protection), but these involve an individual action for a specific natural person that may be, in addition, submitted only with the written consent of such a person.

The institution of 'co-participation', where multiple entities are present on one side of the litigation (the claimant's or defendant's side) feature among typical institutions that tackle the issue of multiple entities, as part of the classic bilateral process. The CCP distinguishes between formal and material collaborative participation. The first occurs when the subject of the litigation involves claims or liabilities of a single type, based on the same factual and legal basis if, in addition, the jurisdiction of the court is justified for each separate claim or liability as well as for all of them jointly. Material collaborative participation takes place if the subject of the litigation involves joint rights or obligations of several entities or rights or obligations based on the same factual and legal basis.

In addition, several individual cases can be merged procedurally for joint examination and resolution or for examination only. Such merging is merely technical in nature, the cases still have a standalone nature and maintain their separateness.

## **i Types of action available**

In accordance with the wording of provisions of the Act (Article 1 and Article 2) the following premises (preconditions for the admissibility of group proceedings) should be met:

- a* homogeneity of claims of the group members;
- b* identical (the same) or, similar (equal) factual grounds (basis) of claims (common factual grounds for claims sought);
- c* size of the group (number of members);
- d* whether the claims can be examined in group proceedings given their object (whether the claims belong to one of the categories of cases – see above); and
- e* in addition, for pecuniary claims, Article 2 (1) of the Act provides for standardisation of the amount of the pecuniary claims of individual group members.

The requirement of homogeneity means that a representative should apply to the court on behalf of each member of the group for legal protection in the same form, for example, for establishment or for payment (sometimes there is a requirement that the claims result from the same type of legal relations). As the Supreme Court explained in its decision of 28 January 2015:

*[i]n this provision, the legislator used the 'claim' term in the procedural meaning, namely as seeking of adjudication of a performance or establishing the existence of a legal relation or law or the formation of a legal relation or law. The need to pursue a 'single type of claim' in group proceedings, within the meaning of this provision, means that all claimants should seek the adjudication of the performance or the establishment or formation of a legal relation or law.<sup>6</sup>*

Claims by members of a group sought in group proceedings, in accordance with Article 1(1) of the Act, should be based on the same (identical) or similar (equal) factual grounds. Without doubt, the interpretation of this premise has risen the greatest doubts in judicature when the Act comes into force. When explaining this premise for admissibility of examining the case in group proceedings, it is argued that the factual grounds of a claim, as referred to in Article 1(1) of the Act, are the main set of facts that constitute the grounds for the origination of a disputed legal relation and a specific claim; the scope of the factual grounds of a claim does not include factual circumstances that affect the amount, objective scope or maturity of the claims.

The requirement for the size of the group means that the proceedings should encompass at least 10 claims.

From the viewpoint of interpretation of the provisions that lay down the premises for the admissibility of group proceedings, the first statements of the Supreme Court based on the Act of 2015 were of particular importance. The following decisions are of note: the judgment issued in the case of a group of close persons injured as a result of a structural collapse (i.e., decision of the Supreme Court, Civil Chamber, of 28 January 2015, I CSK 533/14); judgment of the Supreme Court, Civil Chamber, of 14 May 2015 II CSK 768/14 issued in the case involving a group of consumers pursuing the establishment of liability for damages of a bank for the improper performance of the contract (more precisely, provisions on the method in which interest was accrued on the bank loan); and the resolution of the Supreme

<sup>6</sup> No. I CSK 533/14.

Court of September 2015 regarding the case of a group of local government units against the State Treasury related to the incorrect implementation of the EU law (fees charged in connection with vehicle records).

In the first of the judgments mentioned above, the Supreme Court stressed the need to take the essence, purpose and functions of group proceedings in the course of interpretation of provisions of the Act into account.

When the Supreme Court issued these rulings, the courts examining Polish class actions began to be more open in their judicature towards group solutions for pursuing claims, while the interpretation of the provisions of the Act became more in favour of certification. Since mid-2015, and in particular in 2016, a number of cases have been positively certified, for example, a series of cases against insurance companies related to unfair contractual clauses (pertaining to insurance of a low down payment for a mortgage loan, the so-called liquidation fee).

The group proceedings have no limitations as to the method of shaping the demand for the statement of claim; a class action may be an action for performance (adjudication). In the case of adjudication, the amount of claims sought by various group members must be standardised. A class action may take the form of an action for establishing the legal relation or the right (Article 189 of the CCP) or an action for establishing liability (Article 2(3) of the Act). It is also possible that the demand for a class action involves the demand for shaping the right or legal relation (only in such cases where filing such an action is permitted).

Currently, after Amendment 1, standardisation of the amount of claims means that group members must, altogether or in at least groups of two, seek payment from the defendant in the equal amount (previously the Act required that the standardisation took place after the consideration of the 'common circumstances of the case', which gave rise to doubts and resulted in a different approach of the courts to the interpretation of common circumstances). Now, a sufficient criterion for standardisation is the criterion of the amount.

### ***Action for establishing liability***

An institution unique to group proceedings is the action for establishing liability; the essence of this action was explained by the Supreme Court in the said ruling of 25 January 2015, arguing that:

*In these proceedings, the declaratory judgment regarding a large group of persons is aimed solely at establishing defendant's liability for a specific event and does not concern establishing whether damage was incurred by each of the individual group members. This may, but does not have to be, the subject of assessment only in individual trials, as long as, after the statement of claim for establishing liability is accepted, no individual out-of-court settlements are concluded, which is one of the purposes of issuing such a judgment. If individual trials take place, where a judgment issued on the basis of Article 2(3) is a precedent, then, in such proceedings, individual circumstances will be examined, such as the origin of the damage and its amount, causal link, contribution or limitation if any, as long as it applies to individual claims only and not to all group members. The subject of group proceedings for the demand for establishment are only circumstances that are common to all group members and not individual circumstances of individual members to be examined during individual trials at a later date.*

As regards the action for establishing liability, the issue of the defendant's liability is separated from the size of such liability.



Then the legislator essentially ‘implemented’ the solutions proposed by the Supreme Court to the Act in the form of Amendment 1 to Article 2(3) and Article 2(4) of the Act, where it was specified that the purpose was to establish the defendant’s liability for a specific event or events. The statement of claim should state the pecuniary claim for which such a claim is pursued. When accepting the action, the court establishes circumstances that are common to group members and that are premises for the claims pursued by them.

### **Limitation**

The institution of limitation in the Polish law is an institution of substantive law and not of procedural law. The provisions of substantive law determine the deadline after which, in the event of inaction of the entitled party, specific claims expire (strict time limits) or lose their ability to be enforced (limitation periods).

The particular time limits or limitation periods are defined by the provisions governing a specific institution (e.g., a sales contract). In the absence of specific regulations, the general limitation period for proprietary claims is 10 years, and for claims of periodic performance and claims related to business activity, three years.

The limitation period for claims for compensation under tort liability is specifically regulated. A claim of this sort lapses in principle after three years since the date on which the injured party established the damage and the identity of the perpetrator. However, this period may not be longer than 10 years since the date of the event giving rise to the damage.

The period of limitation for compensation for damage resulting from infringement of competition law is longer, amounting to five years, and its course does not begin to run as long as the infringement is still ongoing and is suspended (the limitation period) for the time of duration of proceedings before state or EU authorities concerning the infringement of competition law.

The court is not required to consider the consequences of the lapses of limitation periods *ex officio*, but only when such defence (objection) is raised by the opposite party.

The Act itself contains no specific regulation on the limitation period for the claims of particular group members. The Act provides that, for a claim of such person, the effects of filing a claim in group proceedings (i.e., primarily an effect of suspension of the limitation period for such claim) shall remain only in the following situations: (1) when a group member files an individual group statement of claims covered by the rejected statement of claims, within 12 months of the decision on the rejection of a group action becoming final; and (2) when a person who joins the group but is not covered by the final court decision on the composition of the group files an individual statement of claims within six months of such decision,

### **ii Commencing proceedings**

The entity exclusively mandated to institute group proceedings is the representative, who acts on his or her own behalf but in the name of all the group members. This function can be performed by a member of the group or a *poviat* consumer ombudsman. Group members agree that a certain person should act as a representative. From a procedural viewpoint, that person is solely a claimant in the group proceedings. The Act introduces the requirement for the representative to act via a professional legal counsel. Apart from that, the Act does not regulate the internal relations between the representative and group members; in practice an agreement is usually concluded to regulate such issues.

Current solutions are based on the opt-in model. Group proceedings are open only to persons who clearly express their will to join the group. The Act does not require the group or class to be defined or specified. The announcement on the commencement of proceedings (see below) should basically provide what claims can be referred to the proceedings by submitting a declaration on joining the group. Such a declaration can be submitted by every person (as long as such a person is capable of acting in court proceedings) and of course provided such person has a claim that can be covered by group proceedings. The provisions of the Act do not provide for limitations as to nationality or place of domicile of persons joining the group (for example as regards claims for damages, where the loss was incurred on the territory of Poland, the place of domicile of the group member is irrelevant). The Act does not provide for specific provisions as to jurisdiction; general rules prescribed by EU legislation or relevant provisions of the CCP apply.

### **Costs**

The Act does not include any specific regulations pertaining to the financing of group proceedings; in general, the Polish provisions lack regulations on the financing of proceedings by third persons.

The loser pays the costs rule is in force. The group representative is the sole claimant, and he or she is formally required to bear the costs of the proceedings.

The Act does not regulate the rules for the redistribution of the costs related to the group proceedings (including the costs of legal services) or any allocation to common costs and the costs attributable to each individual claim inside the group. These issues are left to be arranged between the group members. In practice, usually all group members participate in the costs related to the commencement and conducting of the group proceedings, but the Act does not provide for such a requirement. Group members may freely agree on internal relations among them. It is usually agreed that each member pays a fixed or lump-sum amount or it is agreed that such costs are incurred by an entity in proportion to the value of the claims pursued by them.

The CCP's provisions define the costs of the proceedings not as the costs actually incurred by a party, but the costs necessary for the reasonable pursuance of rights or reasonable defence. These costs also include fees paid to legal counsel, but may not be more than six times a specific minimum rate. The court decides on the cost of proceedings in the decision concluding the case in the given instance.

### **iii Procedural rules**

Group proceedings are divided into stages. Compared to an ordinary individual trial, two specific stages that precede the substantive examination of the merits of the case can be distinguished for group proceedings: stage one is the certification stage and stage two involves shaping the composition of the group.

The first stage, namely the certification stage, is when the court examines whether a specific case can be examined as a class action. A statement of claim in group proceedings should contain a motion to examine the case in this procedure with substantiation. Based on these arguments, the court examines whether the premises for admissibility of the group proceedings are met (as discussed above). If the result of the examination is positive, the court issues a decision on examination of the case in group proceedings, if the result is negative, the court rejects the statement of claim. Previously, the Act required the decision on this subject to be passed after the court hearing (which prolonged this stage). Currently, for statements

of claim brought after 1 June 2017, such a decision may be made at a closed session. Before a decision on this subject is made, the court orders that the defendants submit a response to the statement of claim, where the defendants may object to the case being examined in this procedure.

The 'certification' decision may be challenged in the court of appeals. In accordance with Amendment 1, when the decision on the examination of the case in group proceedings becomes final, the admissibility of group proceedings is not subject to re-examination in the further course of the proceedings.

The decision on the dismissal of the complaint on the decision to reject the statement of claim may be appealed against with a cassation complaint in the Supreme Court. In admitting the cassation complaint, the Supreme Court may repeal the appealed decision and issue a ruling on examination of the case in the group proceedings.

The second stage is shaping the group. This stage begins with an announcement on the commencement of the proceedings and ends when the decision of the court on final group members becomes valid. As regards the method of announcement publication, at present, the provisions of the Act let the court choose the method most appropriate for the given case.

The contents of the announcement are proposed by the claimant, and the court orders the announcement to be published. The publication of the announcement on the commencement of group proceedings<sup>7</sup> is to facilitate notification of all those potentially interested in joining the group. In particular, the announcement may be published on the pages of the public information bulletin of the competent court, on websites of the parties or their legal counsels or in the nationwide or local press. The announcement on the commencement of group proceedings can be skipped if the circumstances of the case show that all group members submitted declarations on joining the group.

Declarations on joining the group from new members are referred to the representative. Based on such declarations, the representative prepares a letter with a list of group members and the declarations. The court delivers a list of group members to the defendant and sets the date for filing objections as to the membership of individual persons in the group. The defendant may challenge the membership of a person in the group by arguing that the claim of that person is different from the claims of other members, for example, that it is based on different factual grounds or does not meet other criteria that the court considered during the certification. Then, the court issues (at a closed session or during the court hearing) a decision on the composition of the group, where it lists, by full name or business name, the persons who are members of the group and specifies membership in subgroups if the group members are divided into subgroups. This procedural decision can also be challenged with a complaint.

As regards proving that a person belongs to the group, for cases involving pecuniary claims, the Act requires the claimant (representative) to prove such a membership, in other cases making the fact plausible is sufficient.

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7 The announcement on commencement of group proceedings should include (Article 11(2) of the Act): (1) identification of the court before which the group proceedings are conducted; (2) designation of the parties to the proceedings and designation of the subject of the case; (3) information about the possible joining the group by persons whose claims may be included in the class action by presenting the group representative, by the prescribed time limit not shorter than one month and not longer than three months from the announcement date, with a written declaration on joining the group; (4) rules of remuneration of the legal counsel; and (5) a mention of the binding effect of the judgment on group members.

Filing a complaint against the decision on the composition of the group does not suspend the substantive examination of the case.

When the decision on the composition of the group becomes final, attempts by members to leave the group becomes ineffective.

The third stage of the proceedings is the examination proceedings as to the merits of the case. In this scope and with regard to the manner of conducting the proceedings to take evidence, the Act introduces no provisions that would be different from those in force for ordinary proceedings. The progress of the proceedings depends on the subject of the case – Polish procedure does not provide for a disclosure institution.

Certain differences are evident at the stage of issuing the judgment. First, the court is obliged to list all the members of the group or subgroup in the judgment (operative part). If the judgment involves pecuniary performance, the court should determine the amount attributable to each member of the group or subgroup separately.

Second, in each case involving a pecuniary claim examined in group proceedings, where the amount of the claim of any of the group member cannot be precisely proven or such proving is particularly difficult, the court may adjudicate, in the judgment, at its own discretion, the amount in favour of that group member that is not greater than the standardised amount of the claim (given the prohibition to make a judgment in excess of the demand). The court may adjudicate, in favour of a member of the group or subgroup an amount that is not higher than the standardised amount of the claim, at its own discretion, based on consideration of all the circumstances of the case and based on the accumulated evidence. To use such an option, the court should hear the parties on the amounts adjudicated in favour of members of the group or subgroup. If the parties present agreeing motions on the amounts attributable to members of the group or subgroup, in accepting the statement of claim, the court shall be bound by such motions, in accordance with Article 20a(2) of the Act, with regard to the amount attributable to members of the group or subgroup.

The fourth stage is the stage of performance of a final and binding judgment. As regards the enforcement of a pecuniary performance, the enforcement can be instituted by any member of the group or subgroup to the extent of the amount adjudicated in their favour, based on the excerpt from the judgment (Article 22 of the Act). As regards cases involving non-pecuniary performance, enforcement of the adjudicated performance is instituted upon the motion of the representative of the group. Six months after the day on which the judgment becomes binding, if the representative of the group does not put forward a motion for instituting the enforcement, the enforcement is instituted upon the motion of any of the group members.

The speed of proceedings was unsatisfactory in the first years; it is evident that at present the cases are processed much faster.

An institution unique to group proceedings is the option for the defendant to demand that the claimant pay the deposit to secure the costs of proceedings. The intention of the legislator was to introduce the deposit as an instrument to deter claimants from rash bringing of class actions.

From the moment the Act came into force, the institution of the deposit is optional, which means that if the defendant files a motion, the court may, but does not have to, commit the claimant to deposit a relevant cash amount as the deposit to secure the costs of proceedings. Initially the Act did not specify the criteria to be followed by the court in reviewing the motion; such criteria were introduced by Amendment 1. Based on the current wording of the Act (Article 8), the court may issue a decision to oblige the claimant to submit

a deposit to secure the costs of proceedings if the defendant makes plausible that the action is groundless and that the lack of the deposit would prevent or considerably hinder the execution of the ruling on the costs of proceedings if the action is dismissed. Circumstances that justify imposition of the obligation to submit the deposit can be, among others, the poor financial situation of the representative (a party) and the lack of regulations applicable to the rules of payment of the costs of proceedings within the group. The court decides on the amount of the deposit in its decision, having regard to the likely sum of costs to be incurred by the defendant. The deposit cannot exceed 20 per cent of the value of the object of the dispute. Although the motion for obliging the claimant to submit the deposit should be placed by the defendant at the first procedural action, the court adjudicates on the deposit when the decision on the composition of the group becomes final. Amendment 1 introduced this rule so that the deposit can be incurred equally by the group (although formally only the claimant, i.e., the representative is obliged to pay it). If, during the case, it transpires that the deposit is insufficient to secure the costs of proceedings, the defendant may demand an additional security. If the deposit has not been submitted during the time frame set by the court, the court suspends the proceedings, and if the deposit is not paid within the next three months, the court rejects the statement of claim or the appeals measure.

#### **iv Damages and costs**

The issues related to damages and their legally permitted amount are governed by substantive law. Polish law incorporates a principle that the damages must not exceed the loss actually suffered by the claimant. Therefore, the damages should correspond to the amount of the loss, and the amount of the damages is determined on a 'differential method' basis. This is based on comparing the assets that would have existed had there been no event causing the loss to the current state of affairs. The principle of *compensatio lucri cum damno* also applies. It is essential that the court may adjudicate, in favour of each group member, an appropriate amount (not greater than the standardised amount) pursuant to Article 322 of the CCP in conjunction with Article 20a of the Act.

In Polish civil law, the general assumption behind the liability for damages is to reinstate the condition that would have existed had the loss event not occurred (Article 361 Section 2 of the Civil Code). The damages remedy the loss and, as a rule, the amount must not exceed the amount of the loss. This also applies to remedying a non-pecuniary loss; the cash compensation for the claimant for the loss incurred should correspond to the size of the loss.

Polish law does not include the concept of punitive damages.

As regards of the rules of sharing the costs and what the cost of proceedings comprise, these issues were discussed above. One of the elements of the costs of proceedings are the costs of court representation – the losing party does not refund the winning party for the costs actually incurred but the costs recognised on a lump-sum basis, being the amount of the specific minimum rate (in the range from one to six times the amount). The Act provides for the option to pay the success fee.

#### **v Settlement**

The progress of mediation proceedings is governed by provisions of the CCP. The Act stipulates that in group proceedings, the court may refer the parties to mediation at any stage (Article 7). There are no specific rules for conducting mediation proceedings in group proceedings. It should be assumed that the representative will participate in the mediation.

In entering the mediation, the representative should consider that the representative should obtain the consent from at least half of the group members to reach a settlement and for other dispositive actions.

In accordance with Article 19 of the Act, withdrawal of an action, withdrawal or limiting the claim and conclusion of a settlement requires the consent of more than half of the group members.

A settlement is subject to control by the court, which may find reaching the settlement inadmissible if circumstances of the case show that this stands in conflict with the law or good manners, aims at circumventing the law or is a gross violation of interests of group members.

To date, only a fraction of class actions have ended with a settlement. At least one of the cases brought against an insurance company ended with a settlement at the preliminary stage of the certification.

#### **IV CROSS-BORDER ISSUES**

The Act may be quite attractive considering the fact that nine Member States of the EU still have no mechanisms of pursuing claims in group proceedings, for example, with regard to pursuing claims for infringement of the competition laws.

The Polish class action is available to overseas claimants, as long as they have claims included in the proceedings and as long as they are willing to participate in the case by submitting a declaration on joining the group.

To date, the case law has not considered the issue of whether a judgment issued in a foreign class action procedure would be recognised or subject to an execution clause in Poland. It should be noted that Polish provisions are quite liberal. As regards the legal order clause, it should be noted that the Polish law follows the principle that the damages must not exceed the loss and the judgment adjudicating punitive damages would certainly be met with the refusal to be recognised or declaration of enforcement as being in contradiction of the proportionality principle of civil law measures against the perpetrator of the damage.<sup>8</sup>

#### **V OUTLOOK AND CONCLUSIONS**

Currently more than 50 class actions (approximately) are pending in Polish courts (at various stages of the proceedings). Considering the number of all cases brought, one may say that the institution of group proceedings is relatively popular.

Undoubtedly the changes introduced in Amendment 1 eliminated the shortcomings that were identified as reasons for excessively lengthy group proceedings. In the future, considerable improvement in this regard should be expected.

In addition, the introduction, to the Polish legal system, of group proceedings based on the opt-out model for same type of cases is being considered at the ministerial level.

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8 See the judgment of the Supreme Court of 11 October 2013, file ref. No. I CSK 697/12.

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Agnieszka Trzaska is an attorney-at-law and partner at Kubas Kos Gałkowski. Agnieszka specialises in civil substantive and procedural law. She represents clients in court proceedings, including group proceedings, and provides consultancy services to commercial entities in the scope of the widely understood civil, commercial and companies law. She has extensive experience in complicated civil cases, in which problems in the scope of private international law and international commercial arbitration occur, as well as in business matters, including disputes between company shareholders. She has been involved in a number of court proceedings, including the case for taking control over a mobile network operator by one of the world's largest communication companies. She possesses vast knowledge in the scope of group proceedings, currently heading the team conducting group proceedings of flood victims from Sandomierz and Płock against the State Treasury and the remaining relevant entities. She also represents one of the largest banks in Poland in a group action of the group of Franc-debtors – persons that took out a mortgage loan denominated to the Swiss francs. Agnieszka is the main editor of the portal on class actions in Poland and worldwide: [www.classaction.pl](http://www.classaction.pl).

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**Law**  
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ISBN 978-1-912228-28-7