

Class Proceedings in Poland

1) Introductory notes.

The introduction of class proceedings into the Polish legal system has been under consideration for a couple of years now. A vigorous discussion concerning this instrument began in January 2007 during a conference on collective litigation¹. In the successive years numerous scientific papers and studies concerning class proceedings have been published in Poland².

The draft act on enforcing claims in class proceedings was prepared by the Council of Ministers³ and it was handed over to the Parliament on 26 March 2009 (document No. 1829)⁴. On 17 December 2009 the Act was adopted and came into force on 19 July 2010⁵.

The Act on enforcing claims in class proceedings introduced a new device into the Polish civil procedure law, which has not been clearly defined in the Polish legal system so far⁶. This Act only includes solutions which are procedural by nature and it is not the source

¹ Conference materials on class proceedings, Warsaw, Ministry of Justice, 18-19 January 2007.

² E.g. R. Kulski, *Powództwo grupowe w świetle amerykańskiego federalnego prawa procesowego cywilnego*, in: *Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych. Materiały konferencyjne Ogólnopolskiego Zjazdu Katedr Postępowania Cywilnego*, Szczecin-Niechorze 28-30 September 2007, p. 189 *et seq.*, A. Świczewska, *Class action oraz inne postępowania zbiorowe*, 'Przegląd Sądowy' 2008, No. 4, p. 23 *et seq.* P. Pogonowski, *Ochrona roszczeń rozproszonych w Anglii i USA – dwa modele regulacji postępowań grupowych*, 'Przegląd Sądowy' 2009, No. 6, p. 102 *et seq.*, by the same author: *Postępowanie grupowe. Ochrona prawna wielu podmiotów w postępowaniu cywilnym*, Warsaw 2010.

³ It is worth to note that the works on the draft act were accompanied by a comparative study of legal solutions in other countries which are effective or currently being elaborated. The Act is not, however, based on any particular legal act.

⁴ See: R. Kulski, *Opinia o rządowym projekcie ustawy o dochodzeniu roszczeń w postępowaniu grupowym (druk sejmowy nr 1829)*, A. Kubas, R. Kos, *Opinia w sprawie projektu ustawy o dochodzeniu roszczeń w postępowaniu grupowym (druk sejmowy 1829)*; opinion available on the following website: <http://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=1829>

⁵ What needs to be emphasised is that it was a very good decision to make a separate act governing class proceedings (instead of including it in the Polish Code of Civil Procedure) because of a multiplicity of problems and a complexity of issues related to class proceedings. It is still possible, though, that the question of regulating class proceedings in the Polish Code of Civil Procedure will have to be reconsidered when a new Polish Code of Civil Procedure is being prepared.

⁶ Class proceedings cannot be compared with joint participation in civil law proceedings (Art. 73 of the Polish Code of Civil Procedure), with bringing an action by a social organisation or another entity in the interest of a third party (Art. 61 of the Polish Code of Civil Procedure) or with combining cases for joint examination (Art. 219 of the Polish Code of Civil Procedure). The analysed new type of civil procedure is classified to the group of proceedings including claims or charges submitted by many people to get a uniform resolution (aggregate proceedings). Read more in: R. Kulski, *Aggregate Proceedings as Tools for Providing Efficiency in Civil Procedure* [in:] *Oral and Written Proceedings: Efficiency in Civil Procedure, vol. II: Presentations. Federico Carpi, Manuel Ortells Ramos Ed.*, Universitat de Valencia Press, 2008, pp. 425-446.

of new claims. Polish class proceedings allow pursuing claims arising from the substantive law⁷.

The introduction of a new regulation concerning class proceedings leads to a modification of the protective function of civil procedure through the widening of the scope of protection of collective interests in this procedure⁸. It may also bring positive social results as e.g. facilitating access to justice to many subjects who would not claim damages in a civil litigation individually. Moreover, class proceedings may turn out useful to the system of justice, allowing for the settling of many civil cases during one action⁹. The benefits of such proceedings are appreciated in other countries, where they have already been put into practice or where their implementation is already in progress. Therefore, we should approve of the introduction of class proceedings in Poland¹⁰.

2) Key (basic) issues related to the Act on enforcing claims in class proceedings.

2.1) The scope of matters that can be dealt with in class proceedings (Art. 1 section 2 of the Act)

Under the draft Act, class proceedings had a wide object range. Such a wide range of applications aroused doubts of some institutions and representatives of the doctrine. All in all,

⁷ At the same time, the act does not introduce any changes in the substantive law along with the introduction of a new procedure of enforcing claims.

⁸ On the protective function of civil procedure and on the growing importance of the protection of collective interests as a protective function of this procedure see: S. Cieślak, *Formalizm postępowania cywilnego*, Warsaw 2009, p. 43 *et seq.* and p. 60. The protection of collective interest in the Polish civil law procedure can be observed in the procedure on declaring provisions of a sample contract illegal (Art. 479[36] – 479[45] of the Polish Code of Civil Procedure). See: K. Weitz, *Postępowanie o uznanie postanowień wzorca umowy za niedozwolone*, in: *Postępowanie sądowe w sprawach gospodarczych. Tom 7. Pod redakcją Prof. T. Wiśniewskiego*, Warsaw 2007, p. 185 *et seq.* An example of a violation of the rule of individual protection of subjective rights in the Polish civil law procedure is also Art. 323 section 2 of the Environmental Act dated 27 April 2001 (Dz. U. [Journal of Laws] of 2008, No. 25, item 150 as amended), which states that if a threat or violation concerns the natural environment as a common good, the State Treasury, a local authority as well as an ecological organisation may lay a claim to restore the state compliant with the law and to undertake preventive measures, in particular through installing fittings or devices which protect against the threat or damage to the environment, and possibly to cease the activity which causes threat or damage to the environment.

⁹ On the advantages of class proceedings e.g. R. Kasprzyk, *Class action*, Acta Universitatis Lodzensis. Folia Iuridica 1986, vol. 27, pp. 79-88.

¹⁰ On the Polish regulation of class proceedings see in particular: T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, Warsaw 2010, K. Piasecki (Ed.), *Kodeks postępowania cywilnego. Vol. II: Komentarz do artykułów 367-505[37]*, p. 775 *et seq.*, P. Grzegorzczak, *Ustawa o dochodzeniu szczeń w postępowaniu grupowym. Ogólna charakterystyka*, Warsaw 2011, M. Rejdak, P. Pietkiewicz, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, Warsaw 2011.

the Act on enforcing claims in class proceedings only covers the positively defined categories of cases.

The cases that can be examined in class proceedings include:

- claims for consumer protection,
- claims arising from liability for damage caused by a dangerous product,
- claims arising from prohibited acts (this includes other claims than those arising from liability for damage caused by a dangerous product with the assumption that this liability qualifies as arising from a tort). The Act excludes, generally, the cases related to claims for the protection of personal interests. This exclusion needs to be criticised¹¹. As a result, class proceedings will be applied in cases concerning some inflicted damage to property by a prohibited act, immission and other violations of ownership or of rights that are protected like ownership (limited rights in property). Class proceedings will also be applicable in disputes between shareholders and public companies (e.g. in the case of failing to fulfil the obligation to provide information on the company).

2.2) Admissibility of class proceedings

Whether a particular action (which also includes class proceedings) can be admitted by a given court for consideration and adjudication depends on prerequisites for court proceedings¹². Independent of the prerequisites for court proceedings, the admissibility of class proceedings depends on some additional circumstances. There are three elements which define the borders of admissibility of class proceedings (regardless of the nature of claim):

- claims are of the same type,
- claims are raised by at least 10 persons (a group),
- claims arise from the same or identical factual basis (Art. 1 section 1 of the Act)¹³.

Moreover, in actions on pecuniary claims, it is indispensable to unify the amount of a claim for every member of the group, allowing for common circumstances of a particular case (it is

¹¹ The list of personal interests is very long and it includes e.g. health and life (see: Art. 23 of the Polish Civil Code). These interests are very susceptible to violation in situations for which the Polish class proceedings have been regulated and which are usually protected abroad by class action.

¹² On prerequisites for court proceedings in the Polish legal literature see: W. Broniewicz, *Postępowanie cywilne w zarysie*, Warsaw 2008, pp. 191-193, J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, *Postępowanie cywilne*, Warsaw 2009, p. 60.

¹³ As compared with the definition of class proceedings used in other countries, it is quite striking that when defining additional grounds for admissibility of class proceedings there is no reservation saying that such proceedings may be initiated when enforcing claims in class proceedings is more effective than in individual proceedings.

possible to make unification in subgroups). Rules of unifying amounts of claims are left to the discretion of group members and representatives.

The court decides in a trial on the admissibility of class proceedings (both, in a positive and negative way). If the court acknowledges class proceedings as admissible it issues a decision on examining the case in class proceedings. If the court decides that a particular case cannot be admitted for class proceedings (and also if the case exceeds the objective scope of the proceedings) it will refuse to allow the claim. It is possible to appeal against both: the decision to examine a case in class proceedings and the refusal to allow claim in class proceedings.

2.3.1) The model of group membership

The method of defining group membership is one of the crucial (conclusive) and probably the most controversial issues in the class proceedings model. The key question here is whether the rights of an individual, which are defined by law, ought to be executed without their express consent and entrusted to somebody, so that the individual can participate in a litigation. Some of the methods (regimes) of defining group membership include, most of all, the opt-in and opt-out models. The Polish Act has adopted the opt-in model. Subjects who have not joined the group may assert their claims in line with general principles (Art. 1 section 3 of the Act).

The fundamental argument for the opt-in regime is the protection of freedom of an individual to participate in court proceedings only if they are willing to do so. Group members who do not wish to take part in the proceedings should not be included in the group due to the fact they have remained silent. A person who is actually interested in the proceedings raises his or her claim which falls within the court definition of a group. The court does not, however, decide whether the person has the legal claim that they assert. At this stage of the proceedings the court only relies on the declaration of a party. The court decides whether there are actually grounds for the claim, i.e. decides on material and legal issues, in the final judgement. If a person does not join the group, whether willingly or even because of their ignorance, they are entitled to institute an action individually. The judgement is binding (*res iudicata*) for all the persons who have executed the opt-in right as if they actually participated in the litigation.

The Polish Act has, in fact, adopted the opt-in model. However, a member of a group may opt out from the group, as stipulated in Art. 1 section 3 of the Act, and the declaration of a group member to opt out from the group may be filed until the decision on the class composition is issued¹⁴. If a group member opts out from the group the proceedings relating to this particular member ought to be discontinued since issuing a decision including such a member has become inadmissible (Art. 355 of the Polish Code of Civil Procedure).

2.3.2) The possibility of introducing the opt-out model into the Polish system of court proceedings

It seems admissible to allow the instituting of an action without the knowledge of the person whose rights are subject to protection, but imposing an obligation of performing a particular action in order to be excluded from the proceedings on a person who is not willing to execute judicial protection by the agency of a group representative may raise objections not only to the compliance with the principle of a free exercise of rights by the parties but it also raises doubts in the constitutional aspect. What we need to realise, however, is that executing the right to opt out from a group does not depend upon fulfilling additional requirements by the interested individual - a group member does not e.g. have to justify his or her decision to opt out from the group. Moreover, we need to consider whether by introducing a (possible) necessity to perform some act in order to opt out from a group, the assertion of claims of lesser value (dispersed) does not become easier for an individual, especially if we think of traditional barriers that impede the access to the court. As a consequence, it is worth considering whether the opt-in model should not be supplemented with the opt-out regime in the Polish Act in relation to class proceedings on small claims, initiated by some public entities (e.g. by the Consumer Advocate)¹⁵.

¹⁴ The usability of the opt-in model depends to a large extent on notification (announcement) on initiating class proceedings and on the class itself. The point is to notify every individual who is interested in a class proceeding and to enable them to join the group if they are willing to do so. The opt-in model may, however, turn up to be little effective, if we allow for some typical models of social behaviour - people, in particular consumers, are afraid of joining a group because of costs and time as well as procedural complexity of a case. There is a common conviction that individual proceedings give better profits.

¹⁵ According to P. Grzegorzczka (*Ustawa o dochodzeniu roszczeń...*, p. 38) we also ought to think that the combined model will have to be considered in Poland in the future.

3) Parties to class proceedings.

3.1) Competence and composition of the court in class proceedings

The Polish class proceedings lie within the competence of a regional court (the court of first instance of a higher rank). Cases are examined by three professional judges. Such a regulation of the court in class proceedings proves that the legislator took the meaning and importance of cases dealt with in these proceedings into consideration. Generally, in the Polish civil law procedure of the first instance, civil cases are resolved before district courts (courts of first instance of a lower rank) by one judge.

3.2) Plaintiff

In Polish class proceedings a court action is brought (only) by a representative of a group who can be either a group member or a poviát (municipal) Consumer Advocate. The representative must be agreed upon by every member of the group¹⁶.

A group representative, if they are not advocates or counsellors at law, grants an advocate or counsellor at law power of attorney to represent the group in court proceedings and concludes a contract with the attorney defining his or her remuneration.

As far as the function of a representative is concerned, some of their activities require particular attention in class proceedings. First of all, persons whose claims may be included in class proceedings submit to the representative a written declaration on joining the group. Second, the group representative prepares a list of persons who have joined the group and presents the list to the court together with the declarations on joining the group. Third, the representative may oblige a group member joining this group to provide, within an indicated time limit, additional evidence or explanations. As it is stated in Art. 16 section 1 of the Act, in actions on pecuniary claims it is the burden of the plaintiff to prove (and in other cases - to make probable) their group affiliation.

¹⁶ Relation between the group representative and group members ought to be regulated separately by the interested parties in the form of an appropriate contract.

3.3) Defendant

The Act on enforcing claims in class proceedings does not envisage the possibility of carrying out class proceedings with the participation of a group representative of the defendant. The lack of a clear regulation and of a detailed provision defining such proceedings leads to a conclusion that it will be inadmissible. However, there will be a possibility of several entities acting as defendants (e.g. if they bear joint and several liability, i.e. a manufacturer and an importer).

4) Stages in the course of class proceedings.

4.1) Instituting an action

The statement of claim in class proceedings needs to comply with all the conditions envisaged for a statement of claim in general (Art. 126 *et seq.* of the Polish Code of Civil Procedure, Art. 187 of the Polish Code of Civil Procedure), and with special conditions envisaged for this type of action in the Act (i.e. a petition to examine a case in class proceedings, indicating the circumstances justifying the admissibility of a class proceeding, declaration of the plaintiff stating that he or she is acting as a group representative and, in actions on pecuniary claims, the amount of claim of every group member. Moreover, the declarations of all the group members on joining the group and their consent to a particular group representative ought to be provided together with the statement of claim, as well as the contract made between the group representative and an attorney, defining the attorney's remuneration.

4.2) Delivering a copy of the group's statement of claim to the defendant and submitting a reply to a statement of claim.

The defendant's reply to a statement of claim ought to include the possible objections concerning the admissibility of class proceedings and objections to the legitimacy of claim as well as a grounded request to secure the costs of court proceedings.

4.3) Court's resolution on the admissibility of class proceedings.

4.4) Announcement on initiation of class proceedings.

Once the decision on examining the case in class proceedings becomes final and unappealable, the court adjudicates to announce the initiation of class proceedings. The function of such an announcement is to provide the public with the most detailed information

possible in reference to the subject matter of the case and the regulations under which the claim is being asserted by the group representative. The mentioned announcement is, in fact, a form of notifying the potential group members of the possibility of joining the group, and thus it ought to have the broadest range possible, so that all the individuals who are interested in a particular assertion of claim can be included in the class proceedings.

4.5) Submitting declarations on joining the group to the group representative by persons whose claims might be included in class proceedings.

4.6) Preparing a list of persons who have joined the group by the group's representative.

4.7) Presenting the list of people who have joined the group together with their declaration on joining the group by the group representative to the court .

The Act does not define the time limit for presenting this list. The representative ought to do it without delay.¹⁷ The moment of presenting declarations on joining the group to the court is the moment at which the consequences of instituting an action arise in reference to parties who are joining the group and it results in the pendency of the case. Such a solution is problematic; the composition of the group is defined by the court (see: paragraph 4.9), which means that the declaration submitted to the group representative is not effective and it is not the document which raises the legal consequence of becoming a group member, but the membership depends on the decision of the court, which constitutes the composition of the group¹⁸.

4.8) Delivering the list of persons who have joined the group to the defendant and defining the time limit (no shorter than one month) for the defendant to submit objections as to group membership. It is worth noting that the plaintiff has the possibility of responding to the objections of the defendant as to group membership within a time limit defined by the court.

4.9) Issuing a decision by the court on the composition of the group, independent of whether the defendant has submitted any objections in this respect or not¹⁹. The court may decide that a class proceeding will only be admissible in reference to a particular group or it may divide the group into subgroups. The decision on group composition is subject to parties' complaint²⁰. Once the decision becomes final and unappealable, the group composition is consolidated and the proceedings are carried out according to general provisions of the Polish Code of Civil Procedure.

¹⁷ T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń...*, p. 306.

¹⁸ Read more on this subject in: P. Grzegorzczak, *Ustawa o dochodzeniu roszczeń...*, p. 74.

¹⁹ This is the crucial moment of the proceedings from the defendant's point of view.

²⁰ A question arises whether the right to file a complaint will also be vested in persons who were trying to obtain the status of group members but were not included in the decision on group composition. In reference to such persons, the decision on group composition is also a decision which terminates proceedings in the case.

5) Judgment in class proceedings.

There are two situations which should be distinguished if the plaintiff wins the case for pecuniary claims. The first one occurs when the court restricts itself to recognising the claims as justified, in principle, deciding only on the defendant's responsibility (Art. 2 section 3 of the Act). Then each member of the group mentioned in the judicial decision may bring an individual action in order to determine the exact amount of claim. The second situation takes place when the court adjudges a precise amount of damages for the group members. Under Art. 21 section 2 of the Act the decision must specify the exact amount of damages due for each member of the group or subgroup.

If non-pecuniary claims are adjudged, the content of the decision should include the names of all the members of the group or subgroup (Art. 21 section 1 of the Act).

A final and unappealable judgment, both - allowing the action as well as dismissing it - has effect of *res iudicata* in relations between each member of the group and the defendant (Art. 21 section 3 of the Act). It is inadmissible to assert claims raised in a class proceeding individually if the action has been dismissed.

6) Enforcement proceedings.

The Act, in principle, does not envisage distinctness in the executive phase of civil law proceedings. An exception only concerns resolutions adjudicating non-cash performance (e.g. an order to refrain from particular activities or to perform some activities) - in this case, in order to avoid a multiplicity of creditors in enforcement proceedings, it is the representative of the group who files the petition to start enforcement of judgment on his or her own behalf, in the interest of group members (Art. 23 section 1 of the Act). If the petition is not filed effectively within 6 months from the day on which the judgment has become final and unappealable, each creditor acquires the right to file a petition on appending an enforcement clause and to start the enforcement of judgment.

7) Costs of class proceedings.

In the analysed proceedings the envisaged court fees are lower than in an ordinary civil law procedure regulated in the Polish Code of Civil Procedure.

In the case of class proceedings concerning proprietary rights, a proportional fee is charged in the amount of 2% of the value of the object of dispute, no less, however, than

PLN 30 and no more than PLN 100 000. In the case of class proceedings concerning proprietary rights where the value of the object of dispute cannot be established at the time of initiating the proceedings, a temporary fee is defined between PLN 100 and PLN 10 000; the amount of the fee may be conclusively determined after the group composition is defined by the court.

In the case of an action on the protection of non-property rights asserted in class proceedings a fixed fee in the amount of PLN 600 is collected.

At the defendant's request the court may oblige the plaintiff to submit a cash deposit (in the amount not higher than 20% of the value of the object of dispute) to secure the costs of the proceedings (Art. 8 sections 1-6 of the Act). At the defendant's request the court will order the use of the deposit in order to satisfy the costs adjudicated to the defendant.

The Act provides a possibility of concluding a contract which would regulate the attorney's remuneration and which would specify the remuneration in relation to the amount adjudged in favour of the plaintiff (Art. 5 of the Act)²¹.

The reimbursement of costs is adjudicated according to the result of the proceedings - from the group representative in the interest of the defendant or from the defendant in the interest of the group representative²².

²¹ A commission fee stipulated in Art. 5 of the Act is not included in the costs of court proceedings and it is not to be reimbursed by the defendant if they lose the case.

²² The Act does not envisage charging proceedings expenses by the court directly to particular members of the group. The question of collecting the funds required to carry out class proceedings as well as the source of these funds is left to the discretion of a group representative and the internal organisation of the group.