

Class Actions in Poland – 2015 UPDATE

Magdalena Tulibacka

I. Introduction:

Since the last Report (the 2011 Report)¹ was written, there has been a steady stream (on average 30 per year) of class actions reaching Polish courts. The 2011 Report focused on the first class actions brought in Poland, and mentioned some of the questions and difficulties inherent in the Polish class actions procedure as regulated by the Class Actions Act of 2009. Three years on, many questions and difficulties remain, albeit the Act is also seen as a success, at least to some extent.² This Update describes how some key elements of the procedure have been working in practice. It examines what works, what does not, and where there is scope for reform or more clear judicial input. The structure of the Update is as follows: after a short introduction, the general characteristics of the Polish class actions are briefly explored. Following this, the attention turns to specific aspects of the actions and their assessment.

The Class Actions Act of 17 December 2009,³ whilst in force for only four years, is one of the most hotly debated and eagerly used pieces of legislation in the recent history of the Polish civil justice system. A significant number of class actions (more than 100)⁴ already found their way to courts. The state (central or local authorities, the state social security scheme, or state hospitals) retains its position as the main defendant. A fair number of actions were also brought against banks, insurers, travel agencies, and developers/house builders. One was brought against an internet-based company dealing with downloading games, movies and other content onto private computers.⁵ Many were rejected because of various formal weaknesses, others because of failure to satisfy substantive requirements for class certification. A small number have gotten through the first certification hurdle. Only a few (two were reported so far)⁶ were

¹ Magdalena Tulibacka and Radoslaw Goral "Polish civil justice update", 2011.

² **Special thanks for their assistance in writing this piece are owed to: Professor Andrzej Kubas and Mec. Agnieszka Trzaska of Kos, Kubas & Gaertner, Kraków, and Profesor Piotr Pogonowski of the University of Lublin's Law Faculty.**

³ (Ustawa o dochodzeniu roszczeń w postępowaniu grupowym), published in Dziennik Ustaw (Journal of Laws) of 2010, no 7; item. 44 p. 1. In force since July 2010.

⁴ M. Suchorabski "Pozwy zbiorowe: ponad 100 spraw w ciągu trzech lat. Czy ustawa jest skuteczna?" (Class actions: over 100 cases in three years. Is the Act effective?), Rzeczpospolita, 16.01.2014, <http://prawo.gazetaprawna.pl/artykuly/771112,pozwy-zbiorowe-w-polsce-ustawa.html>.

⁵ 'Pobieraczek'.

⁶ Not all Polish court judgments are published, and there is no official journal or collection of judicial decisions.

concluded with judgments, and most are still in various stages of proceedings. In most of these cases, the procedure turns out to be long, complex and relatively costly.

The enthusiasm for the Class Actions Act is gradually giving way to very mixed reviews and opinions. Certain essential features of the Act limit its use quite severely. Indeed, some academics and legal practitioners are disappointed with the new procedure, even calling it a 'myth'.⁷ One of the most prominent Polish solicitors expressed the view that class actions simply do not work in Poland, and mentioned a fair number of colleagues who encourage their clients to take individual actions instead.⁸ A prominent barrister reflected on the virtual non-existence of the Act in ordinary legal practice in Poland.⁹ On the other hand, many positive opinions of the Act appeared, stating that it plays an important role in the civil justice system by facilitating access to courts.¹⁰ Nevertheless, even those who express positive views are advocating amendments. It is clear that the Act remains something of an 'experiment', to be adjusted and improved in future.

II. Short Review of the Class Actions Act:

1. Rationale:

The aims of the Class Actions Act were stipulated in the Explanatory Note.¹¹ Some were focused on individual class members: enhancement of access to justice, especially in small cases where it is not worthwhile to individually pursue a claim, and lower costs of justice with the possibility of pulling resources for gathering evidence and in particular for expert opinions. Others concerned the civil justice system and national economy as a whole: procedural economy and greater efficiency of civil justice, better and more efficient use of judicial time, and the potential for greater uniformity of judicial approaches to specific issues.

⁷ M. Domagalski "Pryśka mit pozwów zbiorowych" (the myth of class action dispelled), Rzeczpospolita, 28.06.2010, <http://www.rp.pl/artykul/503821,527163-Pozwy-zbiorowe-w-praktyce-trudniejsze.html>.

⁸ J. Bełdowski, „Ekonomia pozwów zbiorowych”, Radca Prawny (2012) No. 123, p. 10.

⁹ M. Lemkowski, „W codziennej praktyce prawniczej tzw. ustawa o pozwach zbiorowych jest w zasadzie nieobecna” (in every-day legal practice the so-called class actions act is virtually absent), serwisprawa.pl: <http://www.serwisprawa.pl/artykuly,28,13484,dr-marcin-lemkowski-w-codziennej-praktyce-prawniczej-tzw-ustawa-o-pozwach-zbiorowych-jest-w-zasadz>.

¹⁰ M. Suchorabski "Pozwy zbiorowe..." describes the discussion organized by the Polish Press Agency, involving practitioners, academics and consumer organizations, held in January 2014.

¹¹ 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 1st April 2014).

2. Main features:

The Act allows a class action to be brought only by a class member or by a regional consumer ombudsman (public body), in the name of at least 10 people.¹² It is an opt-in mechanism. The courts with the jurisdiction to consider class actions are district courts, not the lower regional courts. A panel of three judges is required.

The limited scope of application (only consumer protection, tort and product liability claims are allowed, with the exclusion of claims for the protection of personal interests¹³) is one of the most controversial aspects of the new law. The Act does not have many detailed criteria for certification (such as typicality or adequacy of representation, present in Rule 23 (a) of the U.S. Federal Rules of Procedure). The requirements for certification of a class action are as follows: it must be brought in the name of at least 10 people with claims of the same kind and with the same or similar factual basis.¹⁴ The Act includes a very interesting requirement, which is indeed unique among other class action models. It is a rather elaborate version of a requirement of commonality present in other systems. If a suit concerns monetary claims, a class action is possible only if the amount claimed by each class member has been made equal with the others (this may be done in sub-classes of at least two people).¹⁵ On the other hand, in cases involving monetary claims the suit may be limited to a mere declaratory relief, and then followed by individual lawsuits.¹⁶

3. Costs and funding:

The 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).¹⁷ It sets the court fee for lodging the case at 2% of the value of the claim,¹⁸ 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.

¹² Article 4.2.

¹³ Article 2.1. The concept of personal interests is not defined in Polish law, but the Civil Code provides a list of examples, such as health, good name or reputation (which is not exhaustive). See below for the detailed analysis of this exclusion and its implications.

¹⁴ Article 1.1.

¹⁵ Article 2.1 and 2.2.

¹⁶ Article 2.3.

¹⁷ On the legal aid system in Poland and its reforms 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, 2010, pp. 453 – 466, at pp. 457 – 459.

¹⁸ Not lower than 30 PLN and not higher than 100.000 PLN.

In contrast to the rules of lawyers' ethics,¹⁹ the Class Actions Act allows lawyers to agree to a success fee limited to the maximum of 20% of the amount recovered for the class. Indeed, legal representation is a requirement – both for a class representative who is a class member and for a regional consumer ombudsman.²⁰

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.²¹ Thus, even if a 20% success fee is agreed, the lawyer will only be able to recover from the loser what the tariff system indicates. The remaining money will need to be covered by the class members.

The defendant has an option to ask for security for costs, which should be provided by the class representative following judicial approval and can reach up to 20% of the value of the claims.²² The court's decision concerning security for costs can be appealed. The amount requested must be paid within one month from the court's decision, in cash. It can be increased later during the proceedings if the circumstances call for it, upon the defendant's request.

4. Stages of proceedings:

Although the Act does not specify this in detail, one can discern (and indeed the law firms dealing with class actions are organizing their activities in this manner) a number of stages to the class action procedure. The first stage starts with a lawsuit brought by a class representative with the assistance of a lawyer. 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. 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. Lawyers dealing with class actions in Poland

¹⁹ Paragraph 50.3 of the Barristers' Code of Ethics (http://www.monitorprawniczy.pl/index.php?mod=m_artykuly&cid=53&id=219&p=4 – accessed on 10th December 2012), and Paragraph 29.3 of the Solicitors' Code of Ethics (<http://antykorupcja.edu.pl/index.php?mnu=12&app=docs&action=get&iid=9739> – accessed on 10th December 2012) prohibit lawyers from charging success fees unless they are an addition to regular hourly or per-task fees.

²⁰ The last point was confirmed by a Supreme Court judgement, the first Supreme Court decision concerning the Class Actions Act - uchwała SN z dnia 13 lipca 2011 r., sygn. akt III CZP 28/11. Interestingly, the Court went against the express statement in the official justification for the Act, mentioned above (published in the Parliamentary Note No. 1829 of 26 March 2009), that no legal representation is required when the consumer ombudsmen represent classes.

²¹ The 'loser pays' principle is regulated by Articles 98 and 108 of the Code of Civil Procedure of 1964. 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. On the tariff system see *ibid.* M. Tulibacka, at p. 464.

²² Article 8.

comment that this first stage is the longest, most costly and complex.²³ The decision to certify the 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 decides on who the class consists of. The decision can be appealed by the defendant, questioning class membership of specific persons.

After this decision is 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 court judgement, naming all class members and specifying their claims and the amount of damages attributed to them (if any), is the execution title.

5. Procedural issues:

In many respects the Act does not regulate the details of the proceedings (in particular those in the third stage) – general civil procedure rules contained in the Code of Civil Procedure of 1964 apply.²⁴ These are rules concerning deliveries, preclusions, expert witnesses and other evidence, or execution of judgements. Further, one of the general principles of civil procedure is ‘loser pays’, the implications of which are mentioned above.

This overall reliance on general civil procedure rules can present significant problems for class actions. The Class Actions Act is intended to play key role in improving access to justice. It is also meant to address the problems with which the Polish civil justice system is struggling: delays, costs and complexity.²⁵ It is therefore problematic that it is built around the traditional rules of civil procedure. These rules affect the legal and institutional culture of courts and lawyers. In particular, the principles governing the position of the judge in litigation, or the selection of experts and their role in civil procedure are difficult to reconcile in this complex

²³ I. Gabrysiak, “Postępowanie sadowe w polskim prawie”, 2014.

²⁴ Article 24.1 of the Class Actions Act.

²⁵ About these problems: see M. Tulibacka “The Ethos of the Woolf Reforms in the Transformations of Post-Socialist Civil Procedures: Case Study of Poland”, in D. Dwyer (ed.) “The Civil Procedure Rules. Ten Years On”, Oxford: OUP, 2009, pp. 395 – 413.

procedural mechanism. These issues are further examined below, in the section on procedural difficulties.

III. Limited scope of application of the Class Actions Act:

The Act was initially envisaged as a universal, generic mechanism encompassing all types of claims, with perhaps some minor exceptions. Due to last-minute amendments in the upper chamber of the Polish Parliament – the *Senat* – Article 1.2 specifies 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 the *Senat*’s amendments), 199 MPs voted against it and only 12 more – 211 - were in favor. The *Senat* also considered including labor law disputes, but this fell through because of concerns for the financial stability of Polish industry.

Some lawyers acting for class members as well as academic writers expressed views that the scope of application of the Act is overly and unnecessarily limited, and there is a strong feeling that in particular labor law disputes ought to have been included.²⁶ Further, it is clear that class actions may not be well suited for certain types of cases: such as complex personal injuries, or product liability cases. Why include tort liability and product liability, but exclude labor law claims, competition law claims or environmental claims which may well be a better fit for this mechanism?

The feeling one gets when reading the work preceding the adoption of the Act is that it was to some extent meant to be a test, and further areas may well be included in future. Indeed, the Helsinki Foundation for Human Rights, which would be expected to argue for the widest possible scope of application, approved the *Senat*’s amendments.²⁷ The Foundation’s view was

²⁶ Professor A. Kubas of Kubas, Kos & Gaertner, in an interview, July 2012. On the other hand, employees are certainly not completely excluded from being able to bring class actions against their employers. If an action is not based on labour law provisions (for instance if the legal basis of a workplace injury claim is general tort law), a class action is possible: 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/artykul/792854,958037-Poszkodowani-w-wypadku-przy-pracy-moga-wystapic-z-pozwem-zbiorowym.html>. On the other hand, there have been views that inclusion of these cases would lead to confusion as to the court with the jurisdiction to consider the class actions involving labour disputes – district courts as per all other class actions or local courts as per regular labour disputes (I. Gabrysiak, reported in M. Suchorabski “Pozwy zbiorowe...”).

²⁷ The Helsinki Foundation for Human Rights monitors legislative processes and Act enforcement in the areas of civil, criminal and administrative justice. The Report was written by Marek Niedużak, “*Pozwy grupowe – po pierwszym roku funkcjonowania*” (group actions – after one year of operation) (‘the Report of Helsinki Foundation’), 2011, available online at:

that the Act would probably be amended in future. The concern for the economy seems to have been an important factor, but once the discussions around the class actions settle and there is a greater clarity on the potential impact of the Act, changes may be forthcoming.

IV. Exclusion of claims for the protection of personal interests – no personal injury claims allowed

The Act excludes claims for the protection of personal interests. This limitation was motivated by the fact that such claims are by their very nature individualized and should be sought through individual actions in court.²⁸

Personal interests are not defined in Polish law, but they are listed in the Civil Code – health, freedom, dignity and good name, conscience, name, image, correspondence, home, and creative output.²⁹ Academic writers 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 Civil Code regulates in detail mechanisms for compensating infringements of personal interests – both compensation of pecuniary claims (*odszkodowanie*) and of non-pecuniary claims (*zadośćuczynienie*).³⁰

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, infringements of personal freedom, dignity or name are most common forms of losses in tort or product liability claims. Their exclusion from the scope of the Class Actions Act is therefore difficult to justify. This is particularly problematic with regard to personal injury: if all personal injury claims are excluded, what indeed is left in most ordinary product liability cases?

<http://www.hfhrpol.waw.pl/legislacja/images/stories/file/Marek%20Nieduzak%20-%20Postepowanie%20grupowe%20po%20pierwszym%20roku%20funkcjonowania.pdf..>

²⁸ The Report of the Helsinki Foundation, at pp. 6, 7. Jaworski and Radzimierski – two academics who wrote the official commentary of the Act, supposed that another reason for the exclusion was the fear of possible class actions against the media and thus a potential threat of restrictions on free press (Por. T.Jaworski, P.Radzimierski, “Ustawa o dochodzeniu roszczeń w postępowaniu grupowym.Komentarz”, Warszawa, 2010,Wydawnictwo C.H.Beck, p.66).

²⁹ Article 23 of the Civil Code. On their protection in Polish tort law see forthcoming: 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.

³⁰ For details see M. Tulibacka “Product Liability in Transition: A Central European Perspective”, Ashgate, 2009, pp. 240 – 242.

The exclusion of personal interests is also controversial for a number of other reasons: if some class members suffered infringements of personal interests and others – claims of a non-personal nature, will the entire action be rejected? Further, if class members individually suffered both types of detriment, will the action be rejected or can it be certified for the non-personal parts of the claim only? Does the claim need to reflect this and only contain the non-personal claims?

The answers to some of these questions came very quickly. In April 2011, the Warsaw District Court refused to certify a class action of victims of the collapse of the Katowice International Trade Hall.³¹ In September 2011 the Warsaw Court of Appeal rejected the complaint against this decision, making it final. These decisions were mentioned in the 2011 Report. The District Court interpreted Article 1.2 of the Act as meaning that a class action is admissible only if class members have non-personal claims (in this context: claims which do not concern personal injury or death). The Court held that, as only 5 out of 16 class members had such claims, it was not possible for the class to be certified. The decision confirmed the fears of some academic writers who argued that the exclusion of protection of personal interests unduly limited the use of class actions in the very cases which the legislator intended to cover – relatively small value personal injury cases. On the other hand, the Court seems to have been open to the possibility of certifying the class by limiting it to those with non-personal claims instead of rejecting the entire suit. In spite of this, the lawyer representing the class called the decision “the death of class actions in Poland”.³² The status quo is as follows: once personal injury is involved, personal interests are involved and this excludes the application of the Class Actions Act. After the 2011 Report was written, the plaintiffs in this case brought cassation proceedings before the Supreme Court. The Court refused to consider the cassation.³³

The position in cases where class members have both personal and non-personal claims remains uncertain. Most likely, class members will need to limit their claims to those of non-personal nature for the purposes of a class action, and seek any other damages in separate,

³¹ Decision of 8 April 2011, II C 121/11. Not published. The collapse caused deaths and injuries. 16 victims and their families brought the class action in 2010. The judge made it clear that his decision by no means reflects the value of individual claims of each victim/family. His decision only concerned suitability of the class actions procedure for these claims.

³² Mec. Adam Car in *Gazeta Wyborcza*, 30 September 2011, „Odrzucenie pozwu zbiorowego ws. katastrofy hali MTK – prawomocne” (rejection of a class action in the MTK Hall case – final and enforceable), http://wiadomosci.gazeta.pl/wiadomosci/1,114873,10387062,Odrzucenie_pozwu_zbiorowego_ws_katastrofy_hali_MTK.html. Mec. Car also spoke of his intention to bring a cassation claim to the Supreme Court (ibid.), as in his view constructing an artificial distinction between different class members is “nonsense” (ibid.).

³³ The Supreme Court considers cassations from final decisions of ordinary courts. They are brought by parties to litigation or by certain public bodies (for instance the Public Prosecutor), where the allegation is a breach of substantive law (its interpretation or application) or procedural law (if it had a material impact on the impact of the case) by the court making the decision. The fact that the Supreme Court did not get involved in this issue means that, for the time being at least, the status quo remains as understood by the courts in this case.

individual actions. In that case, however, one could question the very purpose of the limitation: would it meet the goal of economic efficiency and greater simplicity to duplicate lawsuits concerning one event?

In spite of very clear dissatisfaction (at the very least on the users' side) with this limitation, it is unlikely that changes in this regard are forthcoming. Both the letter and the spirit of the Act appear to indicate the intention to deal with straightforward cases where damages are easily quantifiable, and in many cases equal. It is difficult to achieve such a result where a large number of class members suffered various, or even the same types of, infringements of their personal interests.

V. Standardization of monetary claims – another significant limitation of scope and use of the Act:

1. Meaning:

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). Thus, those who decided to opt in and join the class, and accordingly modify their claims to make them equal with the others, are covered by *res judicata* and cannot claim additional amounts in separate actions. The 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).³⁴ 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 the court 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.³⁵

2. Implications – greater use of liability-only (declaratory relief) suits:

What is happening in reaction to this limitation may well be exactly what the drafters of the Act intended. If a case involves class members with different levels of damages caused by the same

³⁴ 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>.

³⁵ Ibid. Domagalski.

or similar event, the requirement is 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.

The first case concerns flood victims and was brought against the public authorities whose duty it was to maintain flood defences in the Sandomierz area.³⁶ This was indeed one of the first class actions brought in Poland (1st September 2010). Initially the 17 class members' claims amounted to the sum of exceeding 9 million PLN.³⁷ The class was divided into sub-classes: one claiming 100.000 PLN, another 400.000 PLN, another 600.000 PLN, and yet another: 1 million PLN. However, the issue of certification of the class ended up in the Court of Appeal which demanded that the quantification of damages and specification of sub-classes be more precise. Following this direction from the Court of Appeal (2011) the lawyers and the class representative decided to change the claim to a mere declaratory relief. The barrister leading the case (Mec. Agnieszka Trzaska) reported that it was very difficult to quantify the claims as per the Court of Appeal's request. There is no doubt that each victim's losses were different, and grouping them in some larger sub-classes would be extremely challenging. The class was certified in September 2012, and the court set the time limit for opting in to be 6th March 2013. There were around 300 victims (physical and legal persons), and yet not all of them joined the class. In September 2013 the district court of Krakow finalized the class, which consists of 27 members: physical and legal persons, with claims valued at 17,3 million PLN.³⁸

Following the experience of this first case, KKG decided to opt for limiting claims to declaratory relief straight away in the further two class actions. The first one concerns 19 small business owners who claim they suffered losses by being misinformed by ZUS (the Office for Social Insurance). They had been initially informed that when they officially suspended business their obligation to pay social insurance contributions with respect to the business would be suspended too. ZUS changed its interpretation of law after some time and demanded back payments with interest. The second case involves victims of flood, this time in another region of Poland (Płock), suing public authorities for neglect in management and supervision of flood defences.

³⁶ Case brought against the State Treasury (and precisely: against the Wojewoda of the Świętokrzyski district, as well as the Regional Director of Water Management in Kraków) and against the local authorities of the Świętokrzyski district responsible for management and maintenance of water infrastructure in the district.

³⁷ According to exchange rates on 4th January 2013, this amounts to 2.265.118 Euro.

³⁸ "Krakow: Proces ws. Pozwu zbiorowego powodzian – w grudniu" (Krakow: trial in the class action of flood victims in December), Gazeta Krakowska, 6 September 2013.

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 which ‘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 individual claims. Such individual claims can overcome two drawbacks of the Class Actions Act. First of all, they allow each person to claim the amount they are owed as opposed to limiting it to that of the class or subclass member with the lowest claim. The second drawback concerns the exclusion of personal interests from the scope of the Act. Provided that class members have personal as well as non-personal claims, they will most likely need to limit their class action claims to non-personal claims only. However, the declaratory relief can assist them in later individual litigation concerning all losses, both in terms of personal interests and other monetary damages.

These sentiments were reflected in a recent decision of the district court of Lodz in a class action brought by the Regional Consumer Ombudsman for Warsaw against BRE-Bank (MBank). The case was analyzed in the previous Report. Since the Report was written, the Court decided for the class (3rd July 2013). It confirmed that the Bank used an unfair clause in mortgage contracts which resulted in the class members overpaying the interest on their mortgages. The official justification of the decision provided by the court contains a statement that one of its aims should be facilitating individual actions of class members against the Bank to recover the amounts which they overpaid, as well as possibly enticing the parties to settle with no need for further litigation.³⁹

3. Back to commonality:

While the declaratory relief suits may well be capable of circumventing the limitations of the Class Actions Act, they do not guarantee certification unless the claims of class members are seen as exhibiting sufficient commonality of facts and law. The recent decision of the district court of Warsaw (September 3rd, 2013) to refuse to certify a class action of families of victims of the Katowice Trade Hall collapse demonstrates this approach. The suit was yet another attempt at a class action in this tragic case, an earlier one (2011) having been refused because most class members had claims concerning personal interests.⁴⁰ Families of the 32 deceased brought a declaratory relief suit against the State (which was the owner of the land upon which the Trade Hall was constructed). Their claims concerned considerable decline in their living standards following deaths of close family members. The Civil Code enables families of persons who died as a result of a tort to claim, in addition to annuities and compensation for non-pecuniary damage per se, compensation for such considerable decline in living standards

³⁹ II C 1693/10.

⁴⁰ See above – part IV on personal interests.

(Article 446 §3).⁴¹ The claims may pertain to substantial deterioration in an immediate family member's finances, loss of maternal care, loss of a son who was supporting his parents financially, or even mental trauma if it led to worsening of someone's financial standing.⁴² The court declined certification because, it held, those individual conditions of each family member were a dominating element in the suit. Considering these claims in a class action would entail not only looking at the liability of the state for neglect in supervision and maintenance of the Hall, but also analyzing the individual type of loss of each class member. The court emphasized that the nature of a class action requires that the claims of class members have adequate level of commonality, or at least the common elements must be dominating factors.⁴³ This is an interesting decision, and it is yet to be seen how far it will narrow the scope of possible class actions. It is possible that this approach may not be shared by other courts in similar cases, as the Warsaw court presented a relatively creative interpretation of the Act. After all, the Class Actions Act is silent on the issue of prevalence of common interests.

4. Declaratory relief actions and lawyers' fees:

Another key implication of this type of a class action lawsuit is that the possibility of agreeing to a success fee virtually disappears. There is no 'amount obtained for the class' to set as the basis of the fee. KKG reported that when the first flood class action claim was amended, the fee arrangement was also changed from the initial success fee to an up-front fee. The same type of fee was agreed in the following two cases. The fee arrangement for the class in the case against BRE-Bank (MBank) was analyzed in the 2011 Report (it was a declaratory relief suit and the lawyers also demanded an up-front fee). The funding and costs of class actions are examined further below.

5. The future of standardized claims:

Cases where class members do standardize claims still appear in courts, but their future is unclear. An exception would be cases which are straightforward enough for such standardization to not be problematic. An example is a relatively recent, illustrious case against an investment company. Amber Gold invested in gold and some other commodities and, promising returns exceeding 10%, had thousands of investors including politicians, celebrities, and many ordinary people. It operated since 2009. In August 2012 the company announced its liquidation and offered no money back to investors. The decision followed press and television coverage of the suspected failure of the business and financial crimes of its owner. The owner was arrested and faces many years in jail for various financial crimes. Prosecutors received over 4000 complaints, and the law firm dealing with the class action was contacted by over 3000

⁴¹ For a further description see: E. Baginska, M. Tulibacka "Poland" (forthcoming, 2014), at 173.

⁴² Ibid. Baginska, Tulibacka.

⁴³ <http://prawo.rp.pl/artukul/1044542.html>, accessed on April 1st, 2014.

investors within two weeks. By the end of August 2012 the class action (containing 700 people collectively claiming 41 million PLN) was lodged in the Gdańsk District Court. It is estimated that the total loss to all investors exceeds 200 million PLN).⁴⁴ The class was divided into more than 100 sub-classes, claiming between a few thousand and a few hundred thousand PLN. It was clear how much people invested and thus their losses are easy to quantify and probably relatively straightforward to standardize with others. The future of this litigation is uncertain for now because the company has since been declared insolvent.⁴⁵

VI. Representation:

1. Limited scope of representation:

The class representative in Poland is the 'named party' who leads 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: class members and regional consumer ombudsmen. The latter are public functionaries operating alongside the local (*powiat*) authorities.⁴⁶ Their powers include mediating disputes between consumers and traders, consumer advice, and bringing litigation or joining litigation in consumer matters.⁴⁷

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. There are also voices in support of the Insurance Ombudsman as a good candidate for a class representative.⁴⁸

⁴⁴ 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. Interestingly, the law firm representing the class – Chalas & Wspólnicy – demanded an upfront fee (starting from 1000PLN) + 2% of the value of each individual claim to cover the court fee (<http://www.bankier.pl/wiadomosc/Klienci-Amber-Gold-podwojnie-nabici-w-butelke-2900739.html>) - accessed on 3rd April 2014).

⁴⁵ The law firm of Chalas & Wspólnicy brought a new suit following the insolvency – this time against the management of Amber Gold.

⁴⁶ Regional consumer ombudsmen were established by the Act of 5 June 1998 *on powiat self-governance authorities (o samorządzie powiatowym)* (the amended version published in Dziennik Ustaw of 2001 r., No. 142, item 1592). Their powers are regulated by the Act of 16th February 2007 on the protection of competition and consumers.

⁴⁷ In particular: concerning unfair contractual terms, unfair commercial practices, and any other case concerning consumer rights.

⁴⁸ Iwo Garbysiak "Postępowanie grupowe w polskim prawie" (group litigation in Polish law), Instytut Spraw Publicznych, Warszawa, 2014, at p. 6. The role of the Ombudsman is regulated by the Act of 22 May 2003 on insurance and retirement supervision and on the Insurance Ombudsman (published in Dziennik Ustaw (Journal of Laws) of 2003, No. 124, item 1153, and No. 170, item 1651). For a further analysis of the functions of the Ombudsman see: M. Tulibacka "Poland" in C. Hodges, I. Benohr, N. Creutzfeldt-Banda (eds.) "Consumer ADR in Europe", Hart, CH Beck, Nomos, 2012, 167, at 190-191.

According to the Code of Civil Procedure, prosecutors and non-governmental organizations can bring litigation in individual cases (prosecutors in any case, non-governmental organizations – in cases specified by legislation).⁴⁹ 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 possible class representatives other than class members. Empowering a public official to bring class actions makes sense if this official ensures 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 which 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.

2. Consumer ombudsmen and their role in class actions:

Consumer ombudsmen already brought a number of class actions in the name of consumers.⁵⁰ A number of problems arise with regard to the 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'. A further problem relates to the exact scope of the ombudsmen's power to represent a class. The Act requires that ombudsmen act as class representatives 'within the scope of their prerogatives'.⁵¹ 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.⁵² 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.⁵³

3. Position and duties of class representatives:

The duties of class representatives are not regulated in great detail, but it is quite clear that they are substantial. They officially bring the claim to court, submit the required statements

⁴⁹ Article 68 of the Code of Civil Procedure.

⁵⁰ The most prominent one being the case against BRE-Bank, recently won.

⁵¹ "w zakresie przysługujących im uprawnień" Article 4.2.

⁵² 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.rzeczniczy.konsumentow.eu/biuletyny/Biuletyn_rzeczniow_nr_1_2012.pdf. Marek Radwański is the regional consumer ombudsman for Poznań.

⁵³ Ibid. at p. 8.

and documents, and make payments. According to academics and judicial decisions,⁵⁴ class representatives are parties to the case in the formal, procedural sense, while the class members are parties in the material, substantive sense. The idea of a class representative was inspired by other legal systems and aimed at facilitating smooth progression of litigation in actions involving large numbers of people.⁵⁵ Thus, while it is mostly the representative whose presence in various procedural steps is required, courts and academics emphasize the need to uphold the rights of class members to participate in the proceedings as much as it is practical and economically feasible.⁵⁶

Payment of the court fees and any other costs and fees is within the sphere of the representatives' duties. Court fees in class actions amount to 2% of the value of the case, unless the representative is a consumer ombudsman in which case the fee is waived.⁵⁷ Lawyers' fees are subject to an agreement between the lawyers and the class representative. The class representative coordinates payment of respective individual fees by class members. This and any other arrangements with the lawyers or with the class members are not strictly regulated by the Class Actions Act and there is relative freedom with regard to the scope and contents of any formal arrangements.⁵⁸

4. Overall assessment:

The complex obligations may be quite overwhelming, especially for representatives who are class members. Law firms report that they coordinate and monitor how the arrangements are working, helping class representatives. Nevertheless, general feedback from law firms handling class actions at present has been that this particular aspect of the Act works really well. It is normally quite self-evident who the class representative should be, and these are individuals with enough determination and will to carry out the necessary activities.

However, there are also a number of problems with the manner in which representation was regulated by the Act. In comparison to the U.S. and the Swedish models of class actions where class representatives have a legal obligation to adequately and with sufficient care represent the interests of the class members, the Polish Act has no such general obligation. Class members can replace the representative if more than half of them agree (the same majority is

⁵⁴ T. Jaworski, P. Radzimierski, "Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz", Warszawa, 2010, 150-151. See also the official justification to the decision in the case against BRE-Bank: District Court of Lodz, decision of 3 July 2013, II C 1693/10.

⁵⁵ I. Gabrysiak, 12.

⁵⁶ Ibid., 13.

⁵⁷ Where the defendant loses the case, the court will most likely follow the 'loser pays' principle and rule that the defendant ought to cover the court fee which was not paid by the ombudsman (see below for an analysis of the decision of the district court of Lodz in a class action brought by the Consumer Ombudsman for Warsaw against BRE Bank).

⁵⁸ I. Gabrysiak, 12.

required if the representative wishes to modify, withdraw the claim, or settle the dispute). In other words, there is no specific remedy (other than replacing him/her) if the representative does not exercise due care in representing other class members' interests. Further, because it is the class representative only who concludes a contract with the lawyer representing the class, in theory at least the lawyer may well feel most loyalty to the class representative and be less motivated to safeguard the interests of other class members. While academic writers attempted to fill this gap by creating theoretical constructs of a contractual or agency-like relationship between the class and the representative, there are also calls for some form of legislative intervention.⁵⁹ This is particularly important in order to avoid the so-called 'sweetheart settlements', where only the interests of one or a few class members are truly respected. So far, the Act does provide for a type of judicial oversight to avoid such settlements and other actions of the representative which adversely affect the whole class. According to Article 19.2, the court can reject a settlement, dropping of the claim or reducing it, and withdrawing of the case if the circumstances indicate that it would be contrary to law or good faith, or if it would significantly damage the class members' interests.

VII. Lawyer remuneration – success fee or cash up-front?

The Act allows lawyers representing the class to agree to a success fee, with the upper limit of 20% of the amount recovered for the class.⁶⁰ How common are these arrangements in class actions? It appears that lawyers do not use them often. There is anecdotal evidence of one such agreement having been concluded in a class action led by a sole practitioner.⁶¹ One more contingency fee arrangement was concluded in the Sandomierz flood case (mentioned above, handled by KKG), but it 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. Recently, a success fee element of between 10 and 5% (depending on how many people join the case) was added to an up-front fee in a forthcoming class action lawsuit against two insurance companies (Aegon and Skandia).⁶²

Why are these arrangements so rare? After all, the new rule appears an attractive alternative to the current situation in Poland, and some class actions involve large numbers of people with

⁵⁹ Report of the Helsinki Foundation, see Footnote 27.

⁶⁰ Article 5.

⁶¹ The lawyer involved did not wish to impart the information at this time.

⁶² The law firm handling the suits is LWB (Lengiewicz, Wronska, Berezowska & Wspolnicy). Details of the cases: "Modne pozwy zbiorowe slono kosztuja poszkodowanych" (fashionable class actions costs victims a lot), Gazeta Wyborcza, Finanse, 29 January 2014,

http://wyborcza.biz/finanse/1,105725,15355340,Modne_pozwy_zbiorowe_slono_kosztuja_poszkodowanych.html?biznes=trojmiasto#BoxBizTxt

reasonably high claims. Polish lawyers⁶³ 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).⁶⁴ Agreements where lawyers charge exclusively a percentage of the amount recovered (*pacta de quota litis*, or success fees) are not permitted by the rules of lawyers ethics.⁶⁵ Civil procedure laws, including the Civil Procedure Code of 1964, are silent on the issue except for the Class Actions Act. And yet, practice shows how attractive these agreements can be in individual litigation: both for lawyers wishing to gain a wider client base and for prospective clients with no ready cash but promising cases. Before 2011 there was at least a large amount of anecdotal evidence of the presence of success fees in legal practice. In 2010 and 2011 they officially entered the judicial reality: the Supreme Court, and before it two other courts, dealt with legality and enforceability of such an arrangement.⁶⁶ The Supreme Court held that as long as the fee and the manner of its calculation are clear to the client, and as long as the fee to some extent reflects the amount of work performed, courts should not intervene in the substance of these agreements. This case reinforces arguments that success fees are a reality in Poland, even if they go against the letter of the codes of ethics. Whatever the ethical rules of the legal professions indicate, the main principle pertaining to lawyers' fees is freedom of contract, as long as the fee and the method of its calculation are clearly explained to clients.⁶⁷

⁶³ The Polish legal profession consists of barristers (*adwokat*), solicitors (*radca prawny*), notaries, judges and prosecutors. The rules concerning barristers and solicitors' ethics, and their remuneration, are very similar. See M. Tulibacka "Poland" in C. Hodges, S. Vogenauer and M. Tulibacka (eds.) "The Costs and Funding of Civil Litigation. A Comparative Perspective", Oxford: Hart Publishing, 2010: 453 – 466.

⁶⁴ Irrespective of the agreed amount, as mentioned above, Polish law established tariffs for lawyers' fees for cost-shifting purposes, depending on the type of case and on the amount in dispute. On the details of the tariff, see M. Tulibacka "Poland" in C. Hodges, S. Vogenauer and M. Tulibacka (eds.) "The Costs and Funding of Civil Litigation. A Comparative Perspective", at pp. 463 – 464.

⁶⁵ Paragraph 50.3 of the Barristers' Code of Ethics

(http://www.monitorprawniczy.pl/index.php?mod=m_artykuly&cid=53&id=219&p=4 – accessed on 10th December 2012), and Paragraph 29.3 of the Solicitors' Code of Ethics

(<http://antykorupcja.edu.pl/index.php?mnu=12&app=docs&action=get&iid=9739> – accessed on 10th December 2012).

⁶⁶ In the decision of 25 May 2011 (II CSK 528/10) the Supreme Court looked at the issue of enforceability of a success fee agreement between a woman whose son was kidnapped for ransom by the members of Łódź mafia and a lawyer representing her in a civil lawsuit against the criminals and their families. The success fee agreement was upheld.

⁶⁷ Also reflecting this increasing popularity of contingency fee agreements in civil litigation in Poland is the draft amendment of the Barristers' Code of Ethics which would allow charging exclusively success fees. The draft was published in 2011. The proposed success fees are to be limited at 1/3 of the value recovered for the client. The draft is supported by some prominent barristers, although there are others who oppose it fiercely. So far the draft has not been enacted by the Barristers' Council - Katarzyna Żączkiewicz-Zborska, Kancelaria Lex, 2 August 2011. <http://www.kancelaria.lex.pl/czytaj/-/artykul/andrzej-malicki-o-maksymalnym-procentowym-wynagrodzeniu-adwokata>.

Lawyers acting in class actions, however, prefer to use traditional cash remuneration. Many see class actions as too risky to invest in. 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,⁶⁸ 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.⁶⁹ The law firm demands 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 quotes 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.⁷⁰ For other amounts, some amount in between is charged. As mentioned above, the class was divided into more than 100 sub-classes, claiming between a few thousand and a few hundred thousand PLN.

VIII. Further costs of class actions – court fees, experts, etc.

The court fee for a class action was set as 2% of the value of the case, but no less than 30 PLN and no more than 100,000 PLN.⁷¹ If non-pecuniary claims are sought, a temporary fee is set at 600 PLN.⁷² If the value of the case cannot be determined initially, the temporary fee is set between 100 PLN and 10,000 PLN.⁷³ In the practice of class actions so far, such temporary fees are most common. It is often unknown what the ultimate value of the case will be, as the total number of class members is not clear until later in the proceedings.⁷⁴

The court fee is payable upfront, and there is no legal aid to assist class members. While the class representative bears the responsibility for payment of the fee, all class members are of course required to contribute. Normally, the class representative coordinates the payments made by class members, but it is also more and more common for the law firm in charge of the action to collect the money, together with their own fee charged up-front. Each class member is responsible for a part of the fee which is proportionate to the value of their individual claim.

⁶⁸ Analysed above in the section on standardization of claims.

⁶⁹ 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.

⁷⁰ 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.

⁷¹ Article 25 of the Class Actions Act inserted Article 13.2 into the Act on Court Costs in Civil Cases (Act of 28 July 2005, published in Dziennik Ustaw No. 167, item 1398).

⁷² Article 26.1.7 of the Act on Court Costs in Civil Cases, as amended by the Class Actions Act.

⁷³ Article 15.2 of the Act on Court Costs.

⁷⁴ I. Gabrysiak, 14.

Consumer ombudsmen are not required to pay court fees if they act as class representatives. Initially it was unclear whether this meant that the entire class also did not need to pay any court fee. Law firms handling class actions with consumer ombudsmen as representative tended to insert into their remuneration agreement an obligation for the class to pay the court fee if it becomes due. The position has been somewhat clarified in the decision of the district court of Lodz in the class action of the Regional Consumer Ombudsman for Warsaw against BRE-Bank (MBank).⁷⁵ The Ombudsman won the case, and the court followed the ‘loser pays’ principle by ordering the defendant to cover the unpaid court fees and other costs (including expert fees). Class members were never required to pay any court fees. It is unlikely that they would have been ordered to cover them had they lost the case. It appears that, in the absence of legal aid in class actions, the intention is to aid financially at least those classes who are represented by the consumer ombudsmen.

Further costs include expert fees. Experts are appointed by the court upon the parties’ request using official lists of expert witnesses.⁷⁶ Parties can of course use their own experts, but their opinions are not treated as evidence and are not part of litigation costs which the court apportions after the litigation is completed. The party requesting an expert opinion from the court must make an advance payment in respect of their fee, otherwise the expert will not be appointed. The final fees of experts are determined by the court taking into account their professional title, knowledge and experience, as well as the time and effort spent preparing the opinion (which is normally done in writing).⁷⁷ Experts charge an hourly fee, the base of which is around 23 – 31 PLN and can be increased depending on expertise, seniority, and complexity of the case. Experts can also claim reimbursement of travel costs and accommodation, and certain other expenses. Remuneration of translators and other persons involved in litigation is governed by the same principles.⁷⁸ Witnesses, while not entitled to remuneration, can claim reimbursement of travel costs and accommodation, as well as compensation for loss of remuneration.⁷⁹

⁷⁵ Sad Okregowy w Lodzi (district court in Lodz), Wydzial II Cywilny (Civil Branch No II), judgement of 3 July 2013, II C 1693/10. The judgement and official justification were not published. The author found the justification document on the website set up for the purpose of coordinating class actions against banks: <http://www.pozwalembank.pl/wyrok-uzasadnienie-pozew-zbiorowy-bre-mbank/>), accessed on 3rd April 2014.

⁷⁶ Articles 278 – 291 of the Code of Civil Procedure regulate appointment of experts.

⁷⁷ Regulation of the Minister of Justice of 18 December 1975 on costs of obtaining expert evidence in civil litigation (published in Dziennik Ustaw no. 46, item 254).

⁷⁸ Article 89 of the Act on Court Costs in Civil Litigation.

⁷⁹ Article 85 of the Act on Court Costs.

IX. 'Loser pays' and its implications for class actions

The 'loser pays' rule is the leading principle of costs allocation in Polish civil proceedings, including class actions. Thus, class members always need to take into account the possible risk of having to pay their opponent's costs. These costs are not necessarily exorbitant: Polish law establishes a tariff system for lawyers' fees for cost-shifting purposes.⁸⁰ The tariff depends on the type and value of the case, and it can in some cases be multiplied by the court (by a maximum of six times) if the case is particularly complex or the workload especially heavy. The existence of the tariff system entails a complex position for litigants: it could be an advantage or a disadvantage to class members.

Let us consider two possible situations which can occur under the Act.

Scenario 1: a class concluded a success fee agreement with their lawyer and loses the case. Class members do not need to pay their own lawyers (unless success fee is only an add-on to an upfront fee), but they will still need to cover the costs of the opponent's lawyers (as set out by the tariff system), and any other expenses.

What happens if the class wins? They will normally be entitled to have their lawyers' fees covered by the losing party. However, if the fee they paid is higher than the tariff allows it (and the court does not use the power to multiply the amount), the class members will have to cover the remainder from their own pockets.

Scenario 2: a more common situation – the class paid their lawyers up-front and lost the case. They will need to cover the opponent lawyers' fees (again – as established by the tariff system). If the class wins – they will only be reimbursed what the tariff allows, irrespective of what the lawyers were actually paid. This was the outcome of the decision in the case against BRE-Bank, mentioned above.⁸¹ The court awarded the claimant (the Regional Consumer Ombudsman) only around 65,000 PLN for legal costs (the maximum tariff amount of 43,200 PLN, which is 7,200 PLN multiplied by 6 + certain other legal costs and expenses). The class members were not additionally awarded any extra amounts to cover their legal costs. The 2011 Report explored the fee arrangement in this case in some detail. It is clear that the lawyers were paid more than 65,000 PLN by the class members in this case. There were 1,274 class members, and the lawyers required at least 1,000 PLN+45PLN+VAT, which totaled over 1,274PLN from each

⁸⁰ This system was described in some detail in: M. Tulibacka "Poland", in in C. Hodges, S. Vogenauer and M. Tulibacka (eds.) "The Costs and Funding of Civil Litigation. A Comparative Perspective", Oxford: CH Beck; Hart, 2010, pp. 453 – 466, at pp. 464 and 466, and in M. Tulibacka "The Ethos of the Woolf Reforms in the Transformations of Post-Socialist Civil Procedures: Case Study of Poland", in D. Dwyer (ed.) "The Civil Procedure Rules. Ten Years On", Oxford: OUP, 2009, pp. 395 – 413.

⁸¹ Sad Okregowy w Lodzi (district court in Lodz), Wydzial II Cywilny (Civil Branch No II), judgement of 3 July 2013, II C 1693/10.

person. The exact amount depended on the moment of joining (the later a person joined the class, the higher the fee).

The decision against BRE-Bank clarifies a number of issues with regard to cost shifting and cost recovery in class actions. First and foremost, the class representative, who formally is the claimant in the case, is the sole addressee of the costs award and recovers legal fees regulated by the tariff. It is of course possible for the representative to then distribute the recovered amount among the class members, but this would be subject to an agreement between the class and the representative and the court does not intervene in these arrangements at the point of making a decision on costs. There is no possibility of the tariff amounts to be multiplied by the number of class members. The class action is seen as one case, and even though the courts may be willing to multiply the tariff (up to six times), they will not go further than this. The multiplication is due to particular complexity and workload entailed by the class action, and not to the number of people in the class.

Cost allocation decisions are taken by courts at the conclusion of proceedings in each instance. Article 98 of the Code of Civil Procedure specifies that only “reasonably incurred” costs will be reimbursed to the winner. These decisions are subject to the court’s discretion, similarly with the allocation of other costs. According to the Code of Civil Procedure,⁸² if one of the parties behaved unreasonably, or if the loser’s financial position is difficult, the court may decide not to award costs to the winner, or to reduce the amount which would normally be awarded.

The tariff system and the exceptions from the loser pays rule, albeit subject to judicial discretion, mean that the principle itself and the risks for the class are not as significant as they could be, but their position may never be entirely cost-risk-free, even if they win the case.

X. Security for costs, in addition to other costs of class actions – barriers to access to justice?

The Act requires the claimant to provide security for costs if the defendant makes such a request. The request can only be made during the first procedural activity in the case.⁸³ The Report of Helsinki Foundation as well as some academic commentators see this requirement as an impediment to bringing class actions.⁸⁴ The Report points to weaknesses and inconsistencies

⁸² Articles 100 – 105.

⁸³ Article 8. The Article specifies that the court should give the ‘named claimant’ (class representative) at least one month to pay in the security deposit, in cash, and that the amount ought not exceed 20% of the value of the claims in the case. If the money is not paid, the court will (upon the defendant’s request) dismiss the case.

⁸⁴ M. Rejdak, P. Pietkiewicz „Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz” (The Class Actions Act. Commentary), Warszawa, LexisNexis, 2011. For the reference for the Helsinki Foundation see Footnote 27.

within the concept of security for costs as established by the Act and follows that its re-working may be a good idea. The Explanatory Note to the Act sees the security for costs as a filtering mechanism, deterring weak claims and preventing blackmail settlements. Academic writers⁸⁵ agree that it has the potential to serve this purpose but may well deter good claims. In addition to the court fee and the costs of obligatory legal representation, the security for costs increases the cost exposure of class members, who cannot claim legal aid. Further, the Act clearly states that the class representative bears the responsibility for paying the security deposit. Placing such an obligation on the representative only is problematic. Even though in practice all class members will probably contribute, the representative bears the legal responsibility to pay the required amount, in cash. First of all, a class representative cannot claim legal aid, and he may be unable to obtain contributions from other class members. Second, the regional consumer ombudsmen are not required to pay court fees – why require them to pay security for costs?

It is uncertain when the court should consent to the defendants' requests and require the deposit to be paid. It is clear from the Act that the request must be made by the defendant at the latest during the first procedural activity in the case, but when should the court make the decision acquiescing to the request and specifying the amount? If it is done too early, it may happen before the decision to certify the class action is made, if too late – it may be after the class is certified and the class members would have opted in without knowing the full cost exposure. It is uncertain what the maximum amount of the security for costs could be.⁸⁶ The Act specifies that it is 20% of the value of the case, but P. Pietkiewicz rightly observed that this may clash with a general costs rule applied in civil procedure.⁸⁷ As explained above, Polish civil procedure observes the 'loser pays' rule, and for the cost-shifting purposes it adopted a tariff system for lawyers' fees, based on the value of the case. The maximum amount which can be awarded after the maximum multiplication according to the tariff is around 43,000 PLN (around 10,000 Euro).⁸⁸ The amount of 43,000 PLN is hardly an exorbitant amount if one takes into account that a large number of people are involved in class actions. Thus, if the view of Pietkiewicz is the correct one, the security for costs is not as significant a barrier as it may seem at first sight.

There is no comprehensive data on how many requests of security for costs were actually made in Poland. Some anecdotal evidence appeared that they are made often but rarely granted. Courts require the defendants to demonstrate a reasonable concern over the ability of the class to cover the costs. KKG reported that in two of their class actions such requests were denied. Recently, the Court of Appeal of Warsaw upheld the decision of the District Court of Warsaw

⁸⁵ Ibid. M. Rejdak, P. Pietkiewicz.

⁸⁶ Report of the Helsinki Foundation, pp. 13 – 17.

⁸⁷ Ibid. Rejdak, Pietkiewicz „Ustawa...”, p. 160.

⁸⁸ See above for further details.

denying security for costs.⁸⁹ Both courts emphasized that there was no need for security in the light of the contents of the formal agreements between the class and the representative, and between the representative and the lawyers acting in the case. The agreements contained provisions ensuring that adequate resources were available to cover the opponents' costs if the case was lost.⁹⁰

XI. Procedural difficulties – more of the same?

As mentioned above, the Class Actions Act relies heavily upon general rules of civil procedure, in particular with regard to the third stage of class actions: proceedings as to substance of claims. While such reliance on the existing civil procedure rules is understandable, it can be very problematic in a new type of mechanism with its own unique challenges. Polish civil litigation already suffers from significant delays. The judicial system is underfunded and overloaded with cases. Parties have too many opportunities to delay proceedings: by unreasonable requests or by delaying their various steps. More importantly here: judges are often criticised for not taking initiative, not managing litigation effectively. There is some evidence that they avoid making decisions without resorting to expert opinions even in obvious matters.⁹¹ The reasons for these problems are complex, many of them related to legal culture developed after the end of socialism, as a direct reaction to it.⁹² Some are rooted in the manner in which civil procedure rules are formulated, with insufficient levers available to judges to ensure smooth process. These levers have only recently become more significant: on 3rd May 2012 one of the most far-reaching reforms of the Polish Code of Civil Procedure took place.⁹³ Among other changes, the judges were given more powers to entice parties to act with reasonable speed, and to prevent them from presenting evidence or making required statements too late. It is to be seen how and if these reforms improve efficiency of Polish civil justice.

In the context of class actions the problems described above gain even more weight. First of all, collective procedures, because of their complexity and potential for delays, require a greater managerial involvement of judges. In a legal culture where judges are unwilling to take initiative there is a very real danger of inefficiencies, unnecessary steps and lack of clear direction. One

⁸⁹ Court of Appeal: I ACz 1410/12 of 25 September 2012.

⁹⁰ Analysed by I. Gabrysiak, 9-10.

⁹¹ The author of this paper wrote about these problems elsewhere: M. Tulibacka "The Ethos of the Woolf Reforms in the Transformations of Post-Socialist Civil Procedures: Case Study of Poland", in D. Dwyer (ed.) "The Civil Procedure Rules. Ten Years On", Oxford: OUP, pp. 395 – 413.

⁹² See M. Tulibacka "The Ethos of the Woolf Reforms...".

⁹³ Act of 16 September 2011, published in Dziennik Ustaw of 2011, No. 233, item 1381.

could already detect hesitation and suspicion towards the challenge of managerialism during the meeting of the Civil Law Codification Commission on the draft class actions law.⁹⁴ Judges invited to the meeting were quite clear about lack of preparedness for the more active role in litigation. The lack of preparedness they were referring to concerned the judiciary, but also the society with its distrust for judges, again the reaction to the socialist era. The Class Actions Act to some extent addresses the concerns relating to attitudes, expertise, and readiness for greater managerial approach of judges by entrusting class actions to higher level courts (district courts) sitting in panels of three judges. However, the procedural and cultural factors mentioned above need a more complex approach.

Another potential problem pertains to experts used during litigation. They are nominated by the court using nation-wide official lists. There is a shortage of experts, at least in some areas such as medical negligence, and obtaining evidence from them can take years.

Solutions to these problems are as complex as their roots, and what is perhaps most difficult to change is legal culture. A useful first step would be more concrete procedural tools available to judges in order to effectively direct the course of collective litigation. Even in spite of the reform of civil procedure rules mentioned above which allowed judges to exert more pressure on parties, and some deadlines and requirements present in the Class Actions Act itself, there is no guarantee that class actions will progress smoothly and that judges will have the will and the tools to ensure that they do. There are no mechanisms which would allow judges to evaluate and, if required, speed up the progression of the four stages of a class action, or to speed up the transitions between various stages. Perhaps a greater level of cooperation between the parties, their lawyers and the court would assist in achieving these objectives. In the light of the current legal culture of Poland, this type of cooperation may need to be required by law rather than merely encouraged. Something akin to the English pre-action protocols could be quite beneficial.

With regard to experts and the time it takes them to write an opinion, there is no easy solution. A prevailing view is that there are simply insufficient numbers of experts and thus they, like the courts, are overloaded with work. In one recent case involving 29 female patients of a gynecological department of a hospital in Kraków who were contaminated with a hepatitis virus it took the experts four years to write their opinions.⁹⁵ Marcin Dziurda – former head of the Prokuratoria Generalna (body which represents State Treasury before civil courts) – rightly

⁹⁴ The meeting, attended by the author of this update, took place in 2007.

⁹⁵ This was not a class action. The court did, however, use another procedural mechanism of combining lawsuits and processed these cases together. Information source: interview with the lawyer acting for the victims, J. Budzowska, in *Rzeczpospolita*, July 21, 2011, M. Domagalski "Pozwy zbiorowe wciąż w powijakach" (class actions still in immature stage"), <http://www.rp.pl/artykul/503821,690363-Pozwy-zbiorowe-wciaz-w-powijakach.html>.

pointed out that class actions may well be more complex than ordinary actions and thus always require expert opinions.⁹⁶

XII. Encouraging settlements?

The Act, and indeed Polish civil procedure in general, does not encourage settlements to the same extent as the US system with its strict discovery requirements. Discovery brings the parties closer together as regards the information they possess about the claim and about the defense. The Polish civil procedure requires the parties to disclose by a specified time all evidence which they wish to use in the case. The latest reform of the Code of Civil Procedure⁹⁷ ensured that evidence which was not disclosed by the date required cannot be used unless a party shows that it could not be disclosed before and the court decides that its late disclosure will not delay proceedings. This type of disclosure requirement is not an obligation to disclose all evidence, but rather to disclose evidence which the parties wish to use.

It may be worthwhile to consider introduction of discovery into the Polish civil procedure, if only for the purposes of class actions. Otherwise the stipulation in the Class Actions Act: ‘the court can refer the parties to mediation at any stage’,⁹⁸ entails only a formal encouragement to settle, nothing more.

Introduction of discovery, even if only into class actions and not ordinary civil proceedings, would require major amendments to the Civil Procedure Code and is probably not going to happen any time soon. For the time being, the declaratory relief judgement given in a class action may encourage settlements. When the decision as to liability is made, parties can use it as the basis for settlement, and thus avoid further litigation concerning the damages amount.

CONCLUSIONS:

This Update examined the practice of the Polish Class Actions Act through a number of selected features: limitation of scope of application, the need for standardization of claims, declaratory relief suits, costs of litigation and cost-shifting, settlements, and other procedural issues. In spite of a small number of judicial decisions, there is plenty of commentary: both in the popular

⁹⁶ Interview in Rzeczpospolita, July 21, 2011, M. Domagalski “Pozwy zbiorowe wciąż w powijakach” (class actions still in immature stage”), <http://www.rp.pl/arttykul/503821,690363-Pozwy-zbiorowe-wciaz-w-powijakach.html>.

⁹⁷ Act of 16 September 2011, mentioned above.

⁹⁸ Article 7.

press and in academic writings. The commentary is rather clear on the fact that the Act was to some extent meant to be an experiment and will be amended, adjusted and improved in future.

The first four years of class actions in Poland proved that there is a significant need for this mechanism. The procedure is very popular, and even in spite of wide-spread criticism it already earned, it is certainly one of the most important developments in the history of the Polish civil justice. The dissatisfaction with the Class Actions Act rests to a large extent on its limited scope of application and the exclusion of claims for the protection of personal interests. The latter exclusion according to the jurisprudence of the Polish courts means that personal injury claims cannot be processed using the class action mechanism. Of course there are also other problems with the practice of class actions as regulated by the Act: those resulting from lack of clarity, incoherence, lack of certainty as to proper application and interpretation, and the relative lack of experience with this new mechanism.

Discussions about effectiveness or success of the Act must go back to the aims of the legislation. How realistic were they? Can a procedural mechanism grounded in civil procedure suffering from delays, lack of judicial management and legal culture of mistrust of the judiciary heal the Polish justice system, provide access to justice, and ensure efficient, cheap and quick redress? The first four years of Polish class actions left no doubt that this new procedural mechanism has the 'magnifying glass effect' on problems which exist in the civil procedure and law enforcement system. It challenges the existing procedures and judicial arrangements and infrastructure and highlights weaknesses.