**Class Actions in Poland 2016: Lingering problems and reform proposals**

Report for the Conference ‘Empirical Evidence on Collective Redress in Europe’, at the University of Oxford

12 – 13 December 2016

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1. **INTRODUCTION**

The Polish Class Actions Act came into force on 19 July 2010.[[1]](#footnote-1) Since then 188 class actions were brought (amounting to the average of around 31 cases per year) in civil cases, and 7 in commercial cases. While this may seem like a significant number, one needs to put it in perspective: in 2015 the number of claims brought before civil courts in Poland was around 6.5 million. The most common defendants in class actions are: banks, other financial and insurance institutions, the state (specifically: local authorities), some internet-based service providers, and residential builders.

Of the 188 civil and 7 commercial claims, around 117 and 5 respectively were completed. 33 civil claims and all 5 commercial suits were rejected (refused certification because they did not meet the conditions set out by the Act), and 45 civil suits were returned because of various formal inadequacies. Only 38% of the civil claims actually went through the phase of substantive adjudication. A large number of those claims are still in the system. Only around 10 were concluded with final judicial decisions. Generally it is thought that the Act and the procedure it introduced were something of an experiment, and the experiment is not working as well as it was hoped. This Report examines the problems that seem the most significant, using case studies *(in Italic).* The problems are:

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

Indeed, some commentators even talked of the death of class actions in Poland and called for their resuscitation. **The Ministry for Development has within the past couple of weeks announced a number of amendments of the Class Actions Act to improve the functioning of the procedure.** The amendments are part of a legislative package aimed at creating better conditions for businesses (‘*100 Zmian dla Firm’).[[2]](#footnote-2)***As one of the potential changes, the Ministry will be proposing an introduction of an opt-out class action (limited to certain types of cases only). The exact details have not yet been set out.** The other potential changes that have been published so far are mentioned throughout this Report **(in bold for easier recognition).**

1. **Overview of the Class Actions Act:**

The Act introduced an opt-in procedure that can be brought only by a class member or by a regional consumer ombudsman (public body), in the name of at least 10 people.[[3]](#footnote-3) Unless the representative is a practicing lawyer, legal representation is mandatory.[[4]](#footnote-4) 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 Act does not allow class representatives to obtain legal aid (in Poland legal aid consists of legal assistance nominated by court and a waiver of court fees).[[5]](#footnote-5) It sets the court fee for lodging the case at 2% of the value of the claim,[[6]](#footnote-6) 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. In contrast to the rules of lawyers’ ethics applicable in civil proceedings in general,[[7]](#footnote-7) 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.

**III. STATISTICS:**

The Ministry of Justice provided the following statistical information concerning numbers of class actions brought before district courts (first instance) in civil cases between 2010 and end of June 2016:[[8]](#footnote-8)

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Year | Brought | Processed | | | | Remaining |
| altogether | including | | |
| rejected[[9]](#footnote-9) | denied[[10]](#footnote-10) | returned[[11]](#footnote-11) |
| **2010** | 21 | **.** | **.** | **.** | **.** | **.** |
| **2011** | 37 | 21 | 4 | – | 11 | 20 |
| **2012** | 35 | 20 | 6 | 1 | 10 | 33 |
| **2013** | 22 | 26 | 5 | 6 | 5 | 29 |
| **2014** | 41 | 19 | 9 | 2 | 7 | 51 |
| **2015** | 32 | 31 | 9 | 2 | 7 | 52 |
| **I p. 2016** | 15 | 12 | 3 | 1 | 5 | 57 |

Further, in the same time period a small number of commercial cases were also brought before district courts (first instance):

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Year | Brought | Processed | | | | Remaining |
| altogether | including | | |
| rejected | denied | returned |
| **2010** | – | **.** | **.** | **.** | **.** | **.** |
| **2011** | 1 | **.** | **.** | **.** | **.** | **.** |
| **2012** | 4 | 1 | 1 | – | – | 4 |
| **2013** | – | 2 | 1 | – | – | 2 |
| **2014** | 1 | 2 | 2 | – | – | 1 |
| **2015** | 1 | – | – | – | – | 1 |
| **I p. 2016** | – | – | – | – | – | 2 |

**IV. CERTIFICATION REQUIREMENTS:**

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). Nevertheless, many cases still fail at the certification stage. Some of the requirements are quite typical of a class action procedure and relatively straightforward. For instance, the action 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.[[12]](#footnote-12) Other requirements, however, have been heavily criticized as overly stringent, formalistic, difficult to implement, and even, according to some, going against the very nature of a class action procedure.

In the following part of this report I examine a number of particularly controversial requirements using cases where they gave rise to problems. These requirements concern the types of cases covered by the Act (scope), and the standardisation of monetary claims (the requirement that they should all be equal, at least in sub-groups).

1. **SCOPE OF THE PROCEDURE:**

Class actions can only be brought in three categories of cases: “consumer claims, product liability claims and tort liability claims, excluding claims for the protection of personal interests”.[[13]](#footnote-13)

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

* Various consumer law cases, including for instance unfair contractual clauses, unfair commercial practices, consumer credit, package holiday, consumer sales,
* Product liability cases based on the implemented Product Liability Directive, as well as on traditional fault-based tort liability provisions of the Civil Code,
* Other tort liability cases: including medical negligence, liability of state bodies for actions or omissions while exercising public authority (also for issuing legislative or administrative decisions), liability for actions or omissions of another person, or for damage caused by an animal, and, as far as they concern tortious acts: liability within the areas of environmental protection law, competition law, IP law, labour law.

They cannot be brought in the following types of cases:

* Contract B2B claims (C2B contract claims are normally covered),
* Unjustified enrichment B2B claims,
* Claims in the areas of environmental protection, competition, IP and labour law that do not involve tort liability,
* Claims concerning protection of personal interests, whether in consumer cases, product liability or tort liability cases. These include personal injury claims (see below for further analysis).

The limited scope of application is one of the most controversial aspects of the new law. Some lawyers and 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.[[14]](#footnote-14) 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 generally exclude labour law claims, competition law claims or environmental claims[[15]](#footnote-15) that could be a better fit for this mechanism? **Going some way towards responding to the criticisms, the Ministry for Development is proposing to include B2B claims involving contract liability and unjustified enrichment. No other extension has been proposed at this stage.**

Another limitation that, in my view, is difficult to justify is the exclusion of 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 pursued through individual actions in court.[[16]](#footnote-16) 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.[[17]](#footnote-17) 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).

*One of the earliest class action cases illustrates some of the potential problems and controversies this exclusion leads to. In April 2011, the Warsaw District Court refused to certify a class action of victims of the collapse of the Katowice International Trade Hall.[[18]](#footnote-18) In September 2011 the Warsaw Court of Appeal rejected the complaint against this decision, making it final. 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 not related to 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 that 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 2012 the claimants in this case brought cassation proceedings before the Supreme Court. The Court refused to consider the cassation.[[19]](#footnote-19)*

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 where there 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 the majority of product liability cases?

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, individual actions. If this is the 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. **The proposals coming out of the Ministry for Development do not include a reference to this limitation.**

**2. STANDARDISATION REQUIREMENTS FOR MONETARY CLAIMS:**

The Act includes a very interesting requirement, which may well be 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).[[20]](#footnote-20)

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 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): in cases involving monetary claims the suit may be limited to a mere declaratory relief, and then followed by individual lawsuits.[[21]](#footnote-21) 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.[[22]](#footnote-22) 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.[[23]](#footnote-23) 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 consisted of 27 members: physical and legal persons, with claims valued at 17,3 million PLN.[[24]](#footnote-24) The class won the case.*

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 concerned 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 involved victims of flood, this time in another region of Poland (Płock), suing public authorities for neglect in management and supervision of flood defences.*

In an interview, one of the partners of KKG – Professor Kubas referred to the possibility of bringing a declaratory relief suit as a measure that ‘saves’ the Act’s utility in many ordinary cases. His view was that in most cases involving monetary claims, instead of attempting to convince their clients to limit their claims to some extent, his law firm would opt for declaratory relief and plan to follow it with 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 decision of the district court of Lodz in a class action brought by the Regional Consumer Ombudsman for Warsaw against BRE-Bank (now MBank). The Court decided for the class (3rd July 2013). It confirmed that the Bank used an unfair clause in mortgage contracts that resulted in the class members overpaying the interest on their mortgages. The 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 overpaid, as well as possibly enticing the parties to settle with no need for further litigation.[[25]](#footnote-25)*

Cases where class members do standardize claims still appear in courts. These are cases straightforward enough for such standardization. *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, and it seems that since mid-2010 the financial supervision authorities had some knowledge of dubious practices taking place within the company. 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 and his wife were arrested and face many years in jail. Prosecutors received over 4000 complaints, and the law firm dealing with the class action was contacted by over 3000 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.[[26]](#footnote-26) 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 were easy to quantify and probably relatively straightforward to standardize with others. The future of this litigation was uncertain for some time because the company has since been declared insolvent. A new suit was brought against the state, alleging that public prosecutors failed to act in a timely manner in reaction to a public enquiry into the company’s finances. In March 2016 the Court of Appeal certified this class action. It involves over 170 people with losses exceeding 21 million PLN. Again, their claims were standardised. More class members can still join until 14 December 2016. At the same time, a criminal suit against the couple has also finally commenced, and criminal courts in Poland have the power to order perpetrators of crimes to compensate their victims. Commentators are speculating that the civil suit will be concluded faster, as the prosecutors are planning to examine testimony of 430 witnesses.*

**The Ministry for Development announced that the amendment proposals will include mechanisms for easier standardisation, but the exact details have not yet been disclosed.**

In the next part of the Report I highlight other problems with the procedure, specifically the cost and funding issues and the overly complex and long certification and class formation proceedings.

1. **Costs and funding:**
2. **The under-used contingency fee agreements:**

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.[[27]](#footnote-27) There is not much evidence of such arrangements actually being concluded in practice. There is anecdotal evidence of one such agreement having been concluded in a class action led by a sole practitioner.[[28]](#footnote-28) 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. 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 class action lawsuit against two insurance companies (Aegon and Skandia).[[29]](#footnote-29)

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 reasonably high claims. Polish lawyers[[30]](#footnote-30) 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).[[31]](#footnote-31) 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.[[32]](#footnote-32) 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.

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. Further, the possibility of agreeing to a success fee virtually disappears in cases where declaratory relief is sought. There is no ‘amount obtained for the class’ to set as the basis of the fee.

Even in cases where claims have been standardized and it would be possible to conclude a contingency fee agreement, lawyers demand money up-front. In the case against the investment company Amber Gold (analysed above), 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. The law firm demanded between 3,3% and 9,8% of the value of each person’s claim as remuneration payable up-front, in addition to collecting 2% of the value of each claim to cover court fees. Gazeta Wyborcza quoted information given by the law firm that if an amount up to 10,000 PLN is sought, the firm charges 984 PLN, and if it is an amount over 90,000 PLN, the lawyers’ remuneration is 3,000 PLN.[[33]](#footnote-33) For other amounts, some amount in between is charged.

To summarize, it is extremely rare for class members to be able to join a class action without paying quite a considerable fee to their lawyers. Other potential costs of class litigation, and the ‘loser pays’ principle, further increase the cost exposure for class members.

**2. OTHER costs of class actions**

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.[[34]](#footnote-34) If non-pecuniary claims are sought, a temporary fee is set at 600 PLN.[[35]](#footnote-35) If the value of the case cannot be determined initially, the temporary fee is set between 100 PLN and 10,000 PLN.[[36]](#footnote-36) In the practice of class actions so far, such temporary fees are most common. Many ask for declaratory relief. In other cases 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.[[37]](#footnote-37)

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 that is proportionate to the value of their individual claim.

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).[[38]](#footnote-38) 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.[[39]](#footnote-39) 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).[[40]](#footnote-40) 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.[[41]](#footnote-41) Witnesses, while not entitled to remuneration, can claim reimbursement of travel costs and accommodation, as well as compensation for loss of remuneration.[[42]](#footnote-42)

**3. ‘Loser pays’ and its implications for class actions:**

The ‘loser pays’ rule is the leading principle of cost 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.[[43]](#footnote-43) 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 a 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 that 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 reminder 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.[[44]](#footnote-44) 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. 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 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,[[45]](#footnote-45) 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.

**4. SECURITY FOR COSTS:**

The final, and very controversial, element of the costs system for Polish class actions is security for costs. 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 case.[[46]](#footnote-46) 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, otherwise the suit is rejected by the court. It can be increased later during the proceedings if the circumstances call for it, upon the defendant’s request. In practice, most defendants ask for security for costs, and most courts deny it. However, the request process normally delays the first stage of the proceedings by up to one year (see below).

**VI. STAGES OF THE PROCEEDINGS – PROBLEMS WITH THE LENGTHY CERTIFICATION AND GROUP FORMATION STAGES:**

1. **CLASS CERTIFICATION STAGE:**

The stage starts with a lawsuit brought by a class representative with the assistance of a lawyer. The court notifies the defendant of the lawsuit, waits for the defendant’s response, 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. The case will obviously not progress further before the final decision on the issue of security for costs has been finalized (here either party can appeal the decision to the court of appeal). Lawyers dealing with class actions in Poland comment that this first stage is the longest, most costly and complex.[[47]](#footnote-47)

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.

1. GROUP FORMATION STAGE:

After the certification decision becomes final (either because 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 defendant can question class membership of specific persons as well as appeal the final decision on the members of the class.

1. SUBSTANTIVE PROCEEDINGS:

After the 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.

4. ENFORCEMENT:

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.

1. **ASSESSMENT – PROBLEMS WITH LENGTH OF THE FIRST TWO STAGES:**

*The class action against BRE-BANK mentioned above illustrates the problems with such non-flexible, formalistic structure of class action proceedings.*

***Here is the timeline:***

*20 December 2010 – class action lawsuit brought before district court*

*6 May 2011 – district court certifies class*

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

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

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

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

*29 November 2012 – the court of appeal denies the defendant’s request for security for costs (FORMALITIES OFFICIALLY COMPLETED – START OF THE SUBSTANTIVE PART OF THE PROCEEDINGS)*

*16 June 2013 – the first substantive hearing*

*3 July 2013 – first instance decision in favour of claimants*

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

*Thus, it took 30 months from bringing the case for the first hearing on the substance to take place. The whole procedure from bringing the case to the court of appeal decision took 40 months. When compared with the average district court case length of 7.8 months this is striking, even considering that class actions are normally more complex than litigation in individual cases. One can, however, question whether it is indeed the formal dimension of class actions that is or should be complex. After all, the substantive part of the proceedings did not take long. Another problem with this particular case, similar to many other class actions brought in Poland, is that this was a liability-only claim. Each individual claimant had to subsequently approach the Bank and individually request payment of compensation. In some cases, further litigation (this time in individual cases) took place, or is still taking place.*

This is by no means a unique case, and a number of others were reported with similar timelines. The complexity, formality and lack of flexibility in the two first stages of proceedings are a problem. **The answer may come in the amendments proposed by the Ministry for Development. So far it has been announced that the following changes will be introduced:**

1. **Within the first stage (class certification): immediately after the defendant’s response to the claim is received, the court is to set a non-public hearing during which the certification decision will be made.**
2. **Considering the second stage: currently the court cannot start substantive hearings until the defendant’s appeal against the decision establishing the final class membership is decided upon. The amendment will allow the court to start the substantive stage earlier.**

1. Act on Class Actions of 17 December 2009 (*Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*), published in Dziennik Ustaw (Journal of Laws) of 2010, no 7; item. 44 p. 1. [↑](#footnote-ref-1)
2. *T*he amendments of the Class Actions Act are part of the bundle of amendments to existing laws focused on improving the legal position of creditors in the Polish legal system: *Pakiet Wierzycielski*: <https://www.mr.gov.pl/media/21040/Pakiet_wierzycielski.pdf>, <http://www.rp.pl/Gospodarka/311259965-MR-zmiany-w-prawie-pomoga-rozwiazac-problemy-z-pozwami-zbiorowymi.html#ap-1> (date of access: 2 December 2016). [↑](#footnote-ref-2)
3. Article 4.2. [↑](#footnote-ref-3)
4. The Supreme Court judgement of 13 July 2011 held that mandatory legal representation also applies to consumer ombudsmen (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. [↑](#footnote-ref-4)
5. 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. [↑](#footnote-ref-5)
6. Not lower than 30 PLN and not higher than 100.000 PLN. [↑](#footnote-ref-6)
7. 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. [↑](#footnote-ref-7)
8. Information is available at: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/> (date of access: 2 December 2016). [↑](#footnote-ref-8)
9. Rejected suits are those that do not meet formal requirements for group claims, and thus they were denied certification. [↑](#footnote-ref-9)
10. Denied claims are those where the claimants lost the case. [↑](#footnote-ref-10)
11. Suits returned to the claimant because of some formal deficiency. [↑](#footnote-ref-11)
12. Article 1.1. [↑](#footnote-ref-12)
13. Article 1.2. 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). [↑](#footnote-ref-13)
14. 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…”). [↑](#footnote-ref-14)
15. These can in some cases be permissible – see below. [↑](#footnote-ref-15)
16. 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). [↑](#footnote-ref-16)
17. 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. [↑](#footnote-ref-17)
18. 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. [↑](#footnote-ref-18)
19. 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. [↑](#footnote-ref-19)
20. Article 2.1 and 2.2. [↑](#footnote-ref-20)
21. Article 2.3. [↑](#footnote-ref-21)
22. 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. [↑](#footnote-ref-22)
23. According to exchange rates on 4th January 2013, this amounts to 2.265.118 Euro. [↑](#footnote-ref-23)
24. “Krakow: Proces ws. Pozwu zbiorowego powodzian – w grudniu” (Krakow: trial in the class action of flood victims in December), Gazeta Krakowska, 6 September 2013. [↑](#footnote-ref-24)
25. II C 1693/10. [↑](#footnote-ref-25)
26. 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 & Wspolnicy – 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). [↑](#footnote-ref-26)
27. Article 5. [↑](#footnote-ref-27)
28. The lawyer involved did not wish to impart the information at this time. [↑](#footnote-ref-28)
29. 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> [↑](#footnote-ref-29)
30. 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. [↑](#footnote-ref-30)
31. 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. [↑](#footnote-ref-31)
32. 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). [↑](#footnote-ref-32)
33. 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>. [↑](#footnote-ref-33)
34. 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). [↑](#footnote-ref-34)
35. Article 26.1.7 of the Act on Court Costs in Civil Cases, as amended by the Class Actions Act. [↑](#footnote-ref-35)
36. Article 15.2 of the Act on Court Costs. [↑](#footnote-ref-36)
37. I. Gabrysiak, 14. [↑](#footnote-ref-37)
38. 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: pozwalembank.pl (<http://www.pozwalembank.pl/wyrok-uzasadnienie-pozew-zbiorowy-bre-mbank/>), accessed on 3rd April 2014. [↑](#footnote-ref-38)
39. Articles 278 – 291 of the Code of Civil Procedure regulate appointment of experts. [↑](#footnote-ref-39)
40. 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). [↑](#footnote-ref-40)
41. Article 89 of the Act on Court Costs in Civil Litigation. [↑](#footnote-ref-41)
42. Article 85 of the Act on Court Costs. [↑](#footnote-ref-42)
43. 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. [↑](#footnote-ref-43)
44. Sad Okregowy w Lodzi (district court in Lodz), Wydzial II Cywilny (Civil Branch No II), judgement of 3 July 2013, II C 1693/10. [↑](#footnote-ref-44)
45. Articles 100 – 105. [↑](#footnote-ref-45)
46. Article 8. [↑](#footnote-ref-46)
47. I. Gabrysiak, “Postepowanie sadowe w polskim prawie”, 2014. [↑](#footnote-ref-47)